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ABSTRACT

The legal aspects of pupil transportation are examined, including the liability of various factions for transportation decisions and the duty of school districts to provide adequate transportation. Discussed are court decisions dealing with such complex topics as transportation of special education students, transportation for purpose of desegregation, transportation of private school students, the use of rental vehicles, placement of bus stops, funding of transportation, school board defenses in transportation litigation, the care owed to students during transportation, and general financial concerns. School districts are advised to (1) follow the standards and procedures established by state law, (2) have comprehensive policies regarding the type of vehicles to be used for school functions, (3) investigate liability coverage that includes nonschool owned transportation, (4) schedule regular maintenance of buses, and (5) supervise drivers. Extensive footnotes of legal citations accompany the text. (MLF)

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# Legal Aspects of Pupil Transportation

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NOLPE Monograph

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# Foreword

Boards of education, school administrators, and school attorneys more and more frequently are required to make tough decisions concerning the legal aspects of pupil transportation. The central issues involve the liability of various factions for transportation decisions and the duty of school districts to provide adequate transportation. The sole purpose of this monograph is to aid school law specialists in their handling of transportation issues.

The monograph tackles such complex topics as transportation of special education students, transportation for purpose of desegregation, transportation of private school students, funding of transportation, school board defenses in transportation litigation, the care owed to students during transportation, and general financial concerns.

The project was started over a year ago, and the final product will certainly contribute to the educational law field. In addition to Ralph D. Mawdsley, the author, the manuscript was edited diligently by Darel P. Semler, Director of User Services (NOLPE). A special thanks to Mr. Semler for his contribution to this monograph. The manuscript was also proofread by Mary Luna and Dee Slauson of the NOLPE staff. Thanks Mary and Dee.

Thomas N. Jones
Executive Director
NOLPE

Summer 1984

# About the Author

**Ralph D. Mawdsley** is Administrative Counsel and Professor of Educational Law at Liberty Baptist College. He spent twelve years as a teacher and superintendent of schools in Minneapolis before assuming his present position. While in Minneapolis he spent four years as Adjunct Professor of Educational Administration/Vocational Education at the University of Minnesota. In addition to his Ph.D. in educational administration from the University of Minnesota, Dr. Mawdsley earned his J.D. at the University of Illinois and is licensed to practice in Illinois and Minnesota.

He has spoken and written widely on topics pertaining to all phases and all levels of education. He authored the chapter "Constitutional Rights of Students" in *The Courts and Education* published by the National Society for the Study of Education. Dr. Mawdsley has published numerous articles in such professional journals as Illinois Bar Journal, NOLPE School Law Journal, West's Education Law Reporter and the Journal of Christian Education. He has contributed two articles to the NASSP Legal Memorandum and has co-authored two books on schools and the law. Dr. Mawdsley is currently a member of the Authors Committee for West Publishing Company's Education Law Reporter. He is also the co-author of another NOLPE monograph titled *Legal Problems of Religious and Private Schools.*

# Disclaimer

The National Organization on Legal Problems of Education is not an advocacy organization and does not take policy positions on matters of law or public policy. However, in order to encourage discussion of controversial issues, NOLPE invites writers from widely divergent points of view to address current school law issues.

The opinions expressed in the work published by NOLPE do not represent any policy determination of the National Organization on Legal Problems of Education.

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# I.

# Liability for Transportation Decisions

## Introduction

School district or individual school board member or school official liability for transportation fits into a negligence matrix similar to other negligence theory lawsuits. Although there are numerous lawsuits filed each year concerning the operation of school buses, school buses generally "have an extremely good safety record, considering the pupil miles traveled and the type of rider involved."[1] The safety record of school buses is no doubt due in some significant part to state legislation imposing such requirements as annual school bus inspections,[2] maximum passenger capacities,[3] prohibition of use of recapped tires,[4] use of stop signal arms and lights,[5] location of fire extinguishers,[6] required seat belts for driver[7] and required chauffer's licenses for bus drivers.[8] Statutes frequently extend beyond the condition and operation of the school buses themselves and impose requirements upon drivers of other vehicles on a highway.[9] States frequently define what constitutes a school bus and may do so quite expansively to include "any motor vehicle while being used for the transportation of any school pupil at or below the 12th grade level to and from a public or private school or to and from public or private school activities."[10]

1. E. CONNERS, EDUCATIONAL TORT LIABILITY AND MALPRACTICE (1981) at 67.
2. MINN. STAT. ANN. § 169.451 (West 1984); FLA. STAT. ANN. § 234.02 (West Supp. 1983).
3. MINN. STAT. ANN. § 169.44(6) (West Supp. 1984); CAL. EDUC. CODE § 39834 (West 1978).
4. MINN. STAT. ANN. § 169.44(11) (West Supp. 1984).
5. MINN. STAT. ANN. § 169.44(1a) (West Supp. 1984).
6. CAL. EDUC. CODE § 39838 (West 1978).
7. IOWA CODE ANN. § 321.447 (West Supp. 1983-84).
8. FLA. STAT. ANN. § 234.091 (West Supp. 1983); CAL. EDUC. CODE § 39833 (West1978).
9. MINN. STAT. ANN. § 169.44(1) (West Supp. 1984) (driver must stop for stopped bus receiving or discharging children).
10. CAL. EDUC. CODE § 39830(a) (West 1978). However, there are numerous exceptions such as "a motor vehicle of any type carrying only members of the household of the owner thereof." *Id.* at 39830(c).

State Boards of Education are usually delegated to adopt regulations pertaining to the transportation of children and, when adopted, such regulations have the force and effect of law.[11] However, the responsibility for implementing safe means of transportation is the responsibility of each local school district.[12] State statutes may even give local boards the authority to determine whether taxpayer supported transportation needs to be provided.[13] Since local school officials, from the bus driver to members of the local school board,[14] will likely be sued in the event of an injured child, it is especially incumbent upon local school officials and board members to be aware of potential legal problem areas.

## Selection of Transportation

Absent some legislative or judicial mandate[15] to provide pupil transportation, local school districts could elect not to furnish transportation.[16] School authorities have been involved in litigation regarding several issues pertaining to selection of transportation: liability for failure to furnish transportation in optional situations, fairness in considering transportation bidders, and use of alternative forms of transportation.

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11. MINN. STAT. ANN. § 123.80 (West Supp. 1984); Mikes v. Baumgartner, 277 Minn. 423, 152 N.W.2d 732 (Minn. 1967); Anderson v. Ohm, 258 N.W.2d 114 (Minn. 1977); CAL. EDUC. CODE § 39831 (West 1978).

12. FLA. STAT. ANN. § 234.02 (West Supp. 1983).

13. CAL. EDUC. CODE § 39800 (West 1978).

14. The individual liability of board members for the alleged tortious acts of school officials or themselves is often limited to those situations where board members are found to have acted in bad faith. *See* Walt Bennet Ford v. Pulasky Cty. Special School Dist., 624 S.W.2d 426 (Ark. 1981). "In order to hold a member liable, it must be shown that he was motivated by malice, corrupt motive, or attempt to injure." H. HUDGINS & R. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS (1979), at 75-76. However, individual board members may be criminally liable for knowingly permitting to be used "any school bus transporting public school pupils in violation of any school transportation law." IOWA CODE ANN. § 285.15 (West Supp. 1983-84).

15. *See* discussion of legislative and judicial mandates, *infra* p. 28.

16. The election not to provide transportation is really academic since every state requires some form of school transportation as part of its committment to compulsory attendance. For example,

> School boards . . . shall provide transportation for each pupil who should attend a public school when, and only when, transportation is necessary to provide adequate educational facilities and opportunities which otherwise would not be available. . . . FLA. STAT. ANN. § 234.01 (West Supp. 1983).

However, except in certain mandated categories, if bus transportation is optional then failure to continue transportation does not violate equal protection. *See* MICH. COMP. LAWS § 380.246(d) (Supp. 1983-84); Sutton v. Cadillac Area Pub. Schools, 323 N.W.2d 582 (Mich. Ct. App. 1982). *See also* Lintz v. Board of Educ., Alpena Pub. Schools, 325 N.W.2d 803 (Mich. Ct. App. 1982), where discontinuance of bus transportation due to shortage of funding did not violate the state constitution.

The decision by a local school board not to furnish transportation in optional situations frequently involves legal problems other than negligence.[17] Generally though, if the provision of transportation is genuinely optional then lawsuits to force school districts to provide bus service fail because legislative intent not to provide busing is clear[18] or there is no fundamental federal constitutional right to an education.[19] However, it is possible, as where a public school district replaced two-way kindergarten with only one-way busing, that there might be a state law violation where all federal constitutional claims are resolved favorably for the school district.[20]

Occasionally, negligence claims are made by parents or guardians of students injured on their way to or from schools where no bus service has been furnished. In *Plesnicor v. Kovach*[21] a junior high school student was injured as she crossed a street on her way home from school following her after-school participation in an extracurricular activity. Alleging that defendant School Board knew of the high volume of traffic and absence of traffic light by use of which plaintiff could have crossed the busy street safely the complaint charged that the School Board:

(a) Failed to provide a system of bus transportation to transport students remaining after regular class hours to participate in extracurricular activities to their homes.
(b) Provided a bus system for transportation of students which was defective, in that it did not provide transportation for students remaining after normal class hours to participate in extracurricular activities to their homes.[22]

In holding that the school district had no "affirmative duty . . . to supply this missing bus service"[23] the court observed that the state statute made optional the provision of transportation from any school-sponsored activities[24] and that educators should have no greater

17. *See* Lintz v. Board of Educ., Alpena Pub. Schools, *supra* note 16 (state constitutional right to edification); Sutton v. Cadillac Area Pub. Schools, *supra* note 16 (equal protection); State of Kansas v. Board of Educ. of Unified School Dist. 428, 647 P.2d 329 (Kan. 1982) (reimbursement rather than transportation).

18. "[T]he [statutory] provision makes it clear that the legislature has the power *but not the duty*, to provide for the free transportation of students to and from all school." Lintz v. Board of Educ., Alpena Pub. Schools, *supra* note 16 at 805-806.

19. Sutton v. Cadillac Area Pub. Schools, *supra* note 16. *See also* San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1 (1973).

20. Shaffer v. Board of School Directors, 687 F.2d 718 (3d Cir. 1982).

21. 430 N.E.2d 648 (Ill. App. Ct. 1981).

22. *Id.* at 650.

23. *Id.* at 651. For a discussion of the many aspects of school duties to school students and staff *see* R. MAWDSLEY & S. PERMUTH, LEGAL ASPECTS OF RELIGIOUS AND PRIVATE SCHOOLS (NOLPE Monograph 1983) at 6-8.

24. *See* ILL. ANN. STAT. ch. 122 § 29-3.1 (Smith-Hurd Supp. 1983-84).

responsibility for such transportation than would parents under the state's *in loco parentis* statute.[25] In a case in a different jurisdiction, a California Court held that because the responsibility to transport was permissive only, damages for injury to a child walking home from school were not recoverable after a school district decided to provide only one way transportation.[26]

Normally, it is probably safe to state that the absence of a mandatory busing requirement imposes no duty as far as negligence is concerned; however, individual fact situations may indicate that liability should be imposed. In *Foster v. Houston General Insurance Co.*[27] two teachers elected to walk three blocks from their school to a nearby gymnasium with 10 or 11 mentally retarded students rather than seek bus transportation from the school board. There was evidence that even had a request been made there was a policy that bus transportation would not be available for short trips of this nature. Verdicts were rendered against the two teachers and school board for the death of one of the students who ran in front of a car. The liability of the school board under the doctrine of *respondeat superior* was premised upon the teachers' "failure to provide alternate transportation."[28] Although the duty of the school board to provide bus transportation was not technically at issue because the teachers had never made a request for bus service, it would appear from the case that the nature of the students plus the danger represented by the busy street to be crossed effectively suggested that the school board would have been better advised to have provided busing for the students.[29]

Whether or not a school board has a statutory obligation to furnish transportation, it is possible for a board to be liable where transportation, once offered, is unreasonably withheld. In *Toeller v. Mututal Service Casualty Insurance Co.*[30] a bus driver reprimanded two students on his bus and informed them that they would not be permitted to ride the bus the next day. Neither the parents nor the school authorities were informed of the discipline and there was undisputed testimony

25. *See* ILL. ANN. STAT. ch. 122 § 24-24 (Smith-Hurd Supp. 1983-84). For a discussion of the multifaceted application of the concept of *in loco parentis*, *see* R. Mawdsley, *In Loco Parentis: A Balancing of Interests*, 61 ILL. B.J. 638 (1973).

26. Gerard v. Monrovia City School Dist., 264 P.2d 115, 121 Cal. App. 2d 737 (Cal. Ct. App. 1954).

27. 407 So. 2d 759 (La. Ct. App. 1981).

28. *Id.* at 763.

29. This conclusion parallels other school areas where the risk of certain tasks can generate liability even though not specifically covered by a statute. *E.g.*, *see* Butler v. Louisiana State Bd. of Educ., 331 So. 2d 192 (La. Ct. App. 1976).

30. 340 N.W.2d 923 (Wis. Ct. App. 1983).

that such discipline was the province of the school administrator rather than the driver. One of the boys did not tell his parents and the next day borrowed his brother's bicycle to ride to school; while en route he swerved into the path of a truck and suffered extensive head injuries. The bus driver, his contract bus employer and his insurer were found 93% negligent on the theory that "a defendant's duty is established when it can be said that it was foreseeable that his act or omission may cause harm to someone."[31] In *Toeller* it was reasonably foreseeable that an eleven-year-old child might not tell his parents of discipline and would seek to find an alternate means of transportation. Clearly the better course of action would have been to notify the school administrator and let him discuss any dismissals from the bus with the parents.[32]

Many school districts are no longer able to maintain their own bus services and contract out those services to private contract bidders. The actual bidding process itself has generated a certain amount of litigation regarding a bidder's access to information. It is clear that every bidder on bus services should have access to the same information and it can reasonably be anticipated that litigation will arise where one bidder does not receive all the information received by other bidders and is not otherwise treated in the same manner. In *Willett Motor Coach Co. v. Board of Education of the City of Chicago*[33] an unsuccessful bidder on contracts for transportation of handicapped public school children had received the first solicitation of bids and the second amendment from the school board. What the bidder did not receive, and what the board could not prove it had sent,[34] was a first amendment providing that either the Board or the contractor could cancel all contract obligations on 60 calendar days notice. This amendment altered the terms of the first solicitation which had provided that only the Board could cancel the contract on 60 days notice. The unsuccessful bidder was able to secure an injunction ordering a new bidding process because the information in the first amendment would have provided him with leverage in negotiating a new contract with his union drivers. In addition the unsuccessful bidder was able to prove that with knowledge of 60 days cancellation privilege his bid would in fact have been more than $1,000,000 lower than the bid accepted.

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31. *Id.* at 925.

32. If a local school board has a policy permitting suspension from bus service of rebellious students such a policy can be enforced. *See* Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982).

33. 431 N.E.2d 1190 (Ill. App. Ct. 1982).

34. This case is well worth reading as to how a regular routine in handling incoming mail is proved. *Id.* at 1193-94.

However, a court will not annul a contract where information not available to one of the bidders would apparently not have affected the bid. In *We Transport v. Board of Education of Uniondale*[35] the failure to furnish a copy of the current year's daily trip schedule to the plaintiff was not error since the daily trip schedules for the following year on which bids were being submitted had not been made available to any of the parties. Where board members and school purchasing officials permit a successful low bidder to furnish additional information which he should have furnished in his bid but failed to do so, they can be sued individually for tortious interference with contractual rights. In *Walt Bennett Ford v. Pulaski County Special School*[36] a low bidder was permitted, after bids were submitted but prior to awarding of contract, to furnish proof that he was a franchised dealer and to prove that he was entitled to claim a five percent preference for Arkansas residents, both of which were required by Arkansas statute. Although the court determined that board members and school officials could be sued individually, it ruled in favor of the board and school in this case because there was no evidence of bad faith. The court found evidence of good faith because the action of the board and school officials "saved money for the taxpayers."[37] Presumably, if the contract had not been awarded to the low bidder an action for tortious interference with contractual rights might have been successful.

The bidding authority of school boards carries with it the obligation to monitor satisfactory compliance with state statutes and the terms of the contract. Thus, a school board can rescind a transportation contract when it learns that the successful bidder was not a "responsible bidder" within the terms of the statute due to a prior criminal conviction of its principal member.[38] Such a board determination was held to have a rational basis. On the other hand, a school board can permanently enjoin a school bus transportation company from discontinuing or interrupting certain school transportation services where the school board is exercising its "legal duty to modify its bid specifications as required by the public interests."[39] The key element always seems to be whether the action of the school board is made in good faith to promote the best interests of the school district, especially where the board

35. 462 N.Y.S.2d 286 (N.Y. App. Div. 1983).
36. 624 S.W.2d 426 (Ark. 1981).
37. *Id.* at 429.
38. Crescent Bus Corp. v. Board of Educ. of the City of New York, 463 N.Y.S.2d 259 (N.Y. App. Div. 1983).
39. Board of Educ., Smithtown Cent. School Dist. v. Bimco Industries, Inc., 444 N.Y.S.2d 718 (N.Y. App. Div. 1981).

can save the taxpayers' money.[40] Generally, absent statutory authority to the contrary, the power of the members of a school board to reject any and all bids cannot be questioned unless their action is arbitrary, capricious, or unreasonable.[41] A court's purpose is solely to determine whether "the board's decision is supported by substantial evidence . . . and that the board has complied with all relevant rules of law and procedure, including its own rules."[42]

> The burden of proving that the administrative action of the School Board was arbitrary and capricious or an abuse of discretion falls upon the party attempting to upset the administrative order.[43]

The discretion of school board to monitor school transportation is occasionally called into question when bus drivers are dismissed. It is clear in any state that school districts can employ only bus drivers who meet state requirements.[44] Much of the litigation in this area involves lawsuits against state licensing agencies concerning enforcement of state standards. State licensing agency decisions to revoke licenses of bus drivers have been upheld on the grounds that the driver had a history of diabetes[45] or myocardial infarction,[46] that the driver had been convicted of a felony related to his license,[47] and that he had reached the age of 65.[48] In one interesting case a bus driver dismissed because of financial cutbacks sued unsuccessfully his union for failing to file a grievance on his behalf.[49] School boards frequently become defendants when they seek to dismiss drivers who have been guilty of misconduct or who have violated an established state standard. Generally, courts appear to give great deference to the decisions of local school boards.

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40. However, a state statute may permit a school board to select other than the lowest bidder. *E.g.*, IND. CODE § 20-9.1-9 (West Supp. 1983): "The governing body may refuse to award the bid to the lowest responsible bidder, if the amount bid is not satisfactory to the school corporation."

41. *See* 64 AM. JUR. 2d *Public Works and Contracts* § 75, 76.

42. Metropolitan School Dist. of Martinsville v. Mason, 451 N.E.2d 349, 353 (Ind. Ct. App. 1983).

43. *Id.* at 354.

44. Most states require bus drivers to have a special license endorsement. *See, e.g.*, IOWA CODE ANN. § 321.376 (West Supp. 1983-84). Further, state statutes invariably require bus contractors to use only bus drivers who comply with all the laws of the state and authorize a state agency to set qualifications for bus drivers. *See, e.g.*, IOWA CODE ANN. § 285.5(2), 285.8(6)(f) (West Supp. 1983-84).

45. Commonwealth of Pennsylvania v. Slater, 462 A.2d 870 (Pa. Commw. Ct. 1983).

46. Huntsberger v. Commonwealth of Pennsylvania, 463 A.2d 1288 (Pa. Commw. Ct. 1983).

47. Gibson v. Transportation Comm'n, 315 N.W.2d 348 (Wis. 1982) (armed robbery).

48. Maki v. Commissioner of Educ. of the State of New York, 568 F. Supp. 252 (N.D.N.Y. 1983).

49. Stempien v. Civil Serv. Employees Ass'n, 458 N.Y.S.2d 381 (N.Y. App. Div. 1982).

A bus driver dismissal has been upheld where the driver failed "to keep his school bus in a safe, comfortable, and practical operating condition" by not keeping the bus adequately repaired and by not furnishing adequate heat on cold days.[50] In addition, driver dismissals have been upheld for sexual harrasment of children on the bus,[51] for reaching the state mandatory retirement age of 65,[52] and for a single accident where the driver failed to yield the right-of-way.[53]

Potential liability of school officials or school board members for transportation decisions applies not only to use of a school's own buses, but use of methods of transportation other than regular school buses. In *Metropolitan Atlanta Rapid Transit (MARTA) v. Tuck*[54] the school district contracted with MARTA to alter on school days one of its regularly scheduled routes to transport students to and from school and to designated drop-off or pick-up locations. MARTA, which on non-school days was part of Atlanta's public transportation system, was not designated as a "school bus" on the days it carried students. Student plaintiff was injured when he disembarked from the MARTA bus, ran in front of the bus and was struck by an automobile. The issue before the court was whether the MARTA bus was a "school bus" on the days it carried school children and thus was required to be marked as such according to a Georgia statute.[55] The court determined that the MARTA bus was a "school bus" within the meaning of the state statute and that operation of the school bus for a special school route service without displaying the required sign was negligence *per se*. Neither the school board nor school officials were parties to this lawsuit but conceivably they could have been had they had actual notice that their transportation carrier was in violation of state law.[56]

A persistent problem for all school authorities has been the use of vehicles other than school buses for school functions. Plaintiffs have

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50. Sampson v. Administrator, Louisiana Office of Employment Security, 439 So. 2d 458 (La. Ct. App. 1983).

51. Green v. Board of School Comm'rs of the City of Indianapolis, 716 F.2d 1191 (7th Cir. 1983).

52. Ten Hoeve v. Board of Educ. of Dundee Cent. School Dist., 469 N.Y.S.2d 174 (N.Y. App. Div. 1983).

53. Ivy v. Natchitochos Parish School Bd., 428 So. 2d 1332 (La. Ct. App. 1983).

54. 292 S.E.2d 878 (Ga. Ct. App. 1982).

55. GA. CODE ANN. § 68-311 (West Supp. 1983). Apparently not every state requires such an identification, *cf.* IOWA CODE ANN. § 321.372, 321.373 (West Supp. 1983-84). However, California exempts a common carrier from the "school bus" sign requirement only if at the time it is transporting children "it is on a scheduled run and is available to the general public." CAL. EDUC. CODE § 39830(e) (West 1978).

56. *Cf.* Peters v. Wayne State Univ., 691 F.2d 235 (6th Cir. 1982) (where a school could be liable for those with whom it contracts).

attempted to reach the usually more substantial insurance coverage of schools on a number of different theories. In *Caston v. Buckeye Union Insurance Co.*[57] an injured plaintiff was able to satisfy the bulk of his $314,650 judgment against the school's insurer because the private car in which plaintiff was injured was considered a "hired automobile." In *Caston* the person in charge of the field trip had asked for volunteers to drive their family cars. Once at the field trip destination a driver and plaintiff received permission to leave and get a hamburger; the accident occurred enroute. The court categorically rejected the argument that the trip to get a hamburger was a frolic and instead relied on the following fairly standard language in the school's insurance policy:

> Insured means ... (c) any other person while using an owned automobile or a hired automobile with the persmission of the named insured, provided his actual operation ... is within the scope of such permission.
>
> ... Hired automobile means an automobile not owned by the named insured which is used under contract in behalf of, *or loaned to*, the named insured ....[58]

Two factors appeared to satisfy the court that the student's car was a "hired automobile": the car was being used as a substitute vehicle for school buses which were not available for the field trip and the school official had made a request for volunteers. Normally, the mere fact that students use their own cars in relation to school-sponsored activities does not in itself generate liability.[59] However, a school can be liable if it provides transportation but an exception is made for one student[60] or if a student's unauthorized use of his car is known by school officials.[61]

Because of the expense and inconvenience of using buses on field trips and the undesireability of using student cars, schools are increasingly exploring the possibility of leasing or renting cars or vans for field trips. A recent case highlights the legal problems with such a decision. In *Whittington v. Sowela Technical Institute*,[62] a plaintiff recovered a judgment in excess of $300,000, on behalf of himself and his minor son for the death of his wife, against defendant school and its insurer when insurance coverage of the rental company was limited to $10,000. The

57. 456 N.E.2d 1270 (Ohio Ct. App. 1982).
58. *Id.* at 1271 (emphasis is the court's).
59. Bradshaw v. Rawlings, 612 F.2d 135 (3rd Cir. 1979); Rauls v. Dugas, 398 So. 2d 630 (La. 1981).
60. Williamson v. Board of Educ. of Berne-Knox, 375 N.Y.S.2d 221 (1975).
61. Sumter Cty. v. Pritchett, 1865 S.E.2d 798 (S.C. 1971).
62. 438 So. 2d 236 (La. Ct. App. 1983).

deceased was a nursing student at Sowela and voluntarily agreed to participate in the annual school trip to a hospital. Twelve credit hours were awarded by Sowela for participating and no alternative was provided by Sowela for those who chose not to participate. Sowela placed certain restrictions on field trips: the trip had to have an educational purpose relating to nursing; travel had to be done on a Friday and had to be completed in one day; the students could not travel in their private vehicles; two nursing instructors were required to attend and supervise the trip; and the trip had to meet with the approval of the director of Sowela. Prior to departure on the field trip each student including the deceased completed the following "release" form:[63]

Sowela Technical Institute
Practical Nursing Department

I *Wanda Whittington*, voluntarily agree to participate in the following activity:

List activity: M.D. Anderson Senior Trip
Place: Houston, Texas
Date: 4-6-79

and hereby relieve Sowela Technical Institute of any and all liability associated with the above.

s/ Wanda Whittington
Name

4-2-1979
Date

In preparation for the trip one of the instructors, Jean Teel, rented a van from a local rental company, signed in her own name as the customer and paid for all the charges; Sowela received no bills. The liability coverage of the rental contract provided:

> Customer is covered by an automobile liability insurance policy with limits of liability for bodily injury including death equal to the GREATER OF:
> a) The limits of liability under the Customer's personal automobile liability insurance policy in force as of the date of the execution of this Agreement, or

63. *Id.* at 242. The court's discussion of the enforceability of the release is well worth reading, since under Louisiana law a release is considered to be a contract and this release was unenforceable because "the parties were not dealing at arm's length and upon an equal footing."

> b) The statutory limits prescribed under the Financial Responsibility Law or other applicable statute of the state in which the Vehicle is rented.
>
> PROVIDED HOWEVER that such limits shall not exceed $100,000.00 for each person and $300,000.00 for each accident and property damage of $25,000.00 for each accident. A copy of said policy is available for inspection at the main office of Lessor . . .[64]

The trial court determined that Jean Teel's automobile liability insurance coverage was $10,000 and therefore under the contract with the rental company its liability was limited to that sum. In finding Jean Teel to be an agent for Sowela, the court observed that the granting of 12 credits made the trip far less than voluntary and that the expenses of the two instructors were paid by Sowela. In holding the school to be independently negligent the court declared that "Sowela owed a duty to its students to provide transportation under safe conditions."[65] That duty was breached because the school permitted 16 students and 2 instructors to be transported in a van designed to hold 15 persons over a highly traveled interstate highway for a great distance. In addition, the school had not "properly fulfilled its duty of providing a trained driver, e.g. a licensed chauffer . . . ."[66]

The *Whittington* decision may well have disturbing repercussions for school districts and school officials. Two of the commonly stated reasons for using rental cars and vans are to eliminate the high cost of professional licensed drivers and to pass on the insurance risk to the rentor's insurer. *Whittington* casts serious doubt on the validity of those reasons by finding that a school cannot absolve itself of

> the duty . . . to provide a driver qualified and trained in transporting a large group of students over a long distance on a heavily traveled interstate highway.[67]

## Care Owed to Students During Transportation

Schools owe a broad range of responsibilities to students in relationship to transportation. These responsibilities extend from care in

64. *Id.* at 243.
65. *Id.* at 247.
66. *Id.*
67. *Id.*

selecting a bus stop through the entire bus trip to safe delivery of the student at his destination. Although selection of an appropriate, safe bus stop may seem escoteric or tangential when compared with other more obvious transportation problems, the safety of a bus stop has prompted some litigation. In *Brooks v. Woods*[68] a bus stop was established and designated by the school district adjacent to an uncurbed, five-lane main traffic artery with a 45 MPH speed limit. The school bus arrival coincided with the normal rush hour traffic. Plantiff child struck and injured by a car while waiting for the school bus "was a quiet nine-year-old having the skills and learning capacity of a child of only six years."[69] The trial court granted the defendant's demurrer, inferentially holding that the school district had "no legal duty to the child under the facts."[70] In overruling the trial court the appeals court held "that a school district's legal duty to exercise reasonable care extends to any activity of school bus transportation which lies outside the control of the parents."[71] The *Brooks* appeals court further noted that a school district "must provide a reasonably safe bus stop where children may wait for the bus with reasonable safety, having due regard for their age, immaturity and inexperience."[72]

The *Brooks* analysis is by no means consistently subscribed to in every jurisdiction. In *Harrison v. Escambia County School Board*[73] a child was struck and killed while walking along a busy street to a school bus stop. Plaintiffs pleaded breach of a Florida statute as the basis of its negligence complaint.

> Each district school board shall establish school bus stops as necessary at the most reasonably safe locations available. Where unusual traffic hazards exist at school bus stops on roads maintained by the state outside of municipalities, the Department of Transportation, in concurrence and cooperation with and upon request of the district school board, shall place signs at such bus stops warning motorists of the location of the stops.[74]

The gravamen of the complaint was that the school board failed to

68. 640 P.2d 1000 (Okla. Ct. App. 1981).
69. *Id.* at 1001.
70. *Id.*
71. *Id.* at 1002.
72. *Id. See also* School Bd. of Broward Cty. v. Surette, 394 So. 2d 147 (Fla. Dist. Ct. App. 1981), where a school district was liable for maintaining a bus stop near a vacant lot with an overgrown and debris-strewn lawn that obscured the waiting children from approaching motorists.
73. 419 So. 2d 640 (Fla. Dist. Ct. App. 1982).
74. FLA. STAT. ANN. § 234.112 (West Supp. 1983).

direct warning signs to be placed near the bus stop or to find an alternate safe bus stop. In sustaining the trial court's demurrer to the complaint, the appeal's court found the determination of bus stops to be a discretionary governmental function and thus protected by governmental immunity. However, in affirming dismissal of the complaint the appeals court made some conclusions that indicate how divergent are judicial views regarding school district responsibility for selection of bus stops.

> It appears to us that to require the school board to decide on school bus stop location under the threat of tort liability in the event a judge or jury at some later date might determine that the chosen location constituted a safety hazard to an individual child injured enroute to it, would present some difficulties. It is obvious that some potential for injury to a child would exist at any location where motor vehicle traffic exists yet it would be totally impracticable and indeed impossible to locate a bus stop at any place where this would not be true. Furthermore, a location deemed 'most reasonably safe' for some could pose safety problems different both in kind and degree for other pupils, given the fact that they very likely approach the bus stop from different directions, and by different routes. Finally, one might easily conclude that the safety of each child could be insured to the utmost only by requiring the bus to stop at each child's home, yet it is equally apparent that this would be totally impracticable because of other factors, such as the length of time the children would be required to endure the bus ride, the potential for increased traffic congestion owing to excessive bus stops, and the increased hazards generated by the bus leaving and re-entering well-travelled routes, to name but a few.[75]

Ignoring the "strawman"[76] reasoning of the *Harrison* court, it is somewhat distressing to read such an unwarranted defense of the absence of any responsibility by a school district to prevent further accidents. Once the *Harrison* court had determined that the school district was immune from liability, it would seem that the court would have been better disposed to have suggested the placement of warning signs as authorized by the Florida statute. To attack those who raise a problem rather than attempt to remediate a problem once raised almost appears to be judicial acquiescence in philosophical fatalism: whatever will happen will happen. Although it was probably not the

75. Surette, *supra* note 72 at 644.

76. *See* J. SAYER, ARGUMENTATION AND DEBATE: PRINCIPLES AND APPLICATIONS (Sherman Oaks, Cal., Alfred Publishing Co. 1980), at 194.

court's intention to create such an appearance, this cavalier treatment regarding the lives of children produces a harsh, discordant rationale and one that would be better if not adopted by other jurisdictions.

Once children are on a school bus, the school has a duty to exercise ordinary, reasonable care to deliver them to their destination. Where children are involved "the duty to exercise due care should be proportioned to the child's incapacity to adequately protect himself."[77] It can be expected that a school will utilize whatever means are necessary to prevent reasonably foreseeable accidents to children. In *Arnold v. Hayslett*,[78] a school had assigned a teacher to serve as a monitor in assisting buses to pull safely out of the school parking area. The monitor's function apparently was to give directions to the bus driver as he backed up the bus and to warn students to keep their heads and arms in the bus while it was in motion. After giving several warnings to a number of students to keep their heads and arms in the bus, the monitor signalled for the bus to back up; suddenly a 12-year-old student stuck his head out a window and was fatally injured when his head struck a guy wire in close proximity to the bus. In holding for the school district, the court observed that school buses are not common carriers and thus schools owe only "ordinary reasonable care under the circumstances."[79] The deceased student's age plus repeated warnings by the monitor were enough to make the student's action proximate contributory negligence thus precluding all recovery under Tennessee law.[80]

Control of student conduct on buses has been a source of some litigation but certainly not to the extent that lawsuits regarding alleged lack of supervision on school premises.[81] In *Blair v. Board of Education of*

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77. Sharpe v. Quality Educ., Inc., 296 S.E.2d 661, 663 (N.C. Ct. App. 1982). Occasionally, this judicial standard is enhanced by a legislative policy statement. *See* FLA. STAT. ANN. § 234.02 (West Supp. 1983): "Maximum regard for safety and adequate protection of health shall be primary requirement which shall be observed by school boards in routing buses, appointing drivers, and providing and operating equipment . . . ."

78. 655 S.W.2d 941 (Tenn. 1983).

79. *Id.* at 944. *See also* Hawkins Cty. v. Davis, 391 S.W.2d 658 (Tenn. 1965). What is reasonable will vary with age and capacity of the children. Cartwright v. Graves, 1845 S.W.2d 373 (Tenn. 1944).

80. Tennessee is not a comparative negligence state but it does have a remote contributory negligence concept which does permit mitigated recovery of damages. In *Arnold* the trial judge had found the decendent guilty of remote contributory negligence and awarded $40,000 to his next of kin, but both the court of appeals and supreme court found decedent's negligence to be proximate thus preventing all recovery.

81. *See* R. MAWDSLEY & S. PERMUTH, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS (NOLPE Monograph 1983). The relative infrequency of lawsuits regarding student conduct on buses may be accounted for partially by the fairly short period of time students ride buses.

*Servurne-Earlville Central School*[82] a student on a bus sustained permanent injury to his eye when struck by an object thrown by another student. In affirming the judgment in excess of $100,000 against defendant the court noted that the driver had been advised at least 15 minutes prior to the injury of disruptive behavior but had failed to take any action to stop it. While there may well be unforeseen occurrences, it is well to remember that bus drivers are generally agents of the school[83] and therefore their actions or non-actions will generate liability for the school. In *Scott v. Thompson*[84] a school district was liable for a $65,000 damage award where a student left the bus and was hit by a car after the bus driver left the bus with students on it and went into a garage for a cup of coffee. However, not every action of a bus driver will necessarily generate liability for the school district. In *Johnson v. Carthell*[85] a school district was held to be exempt from liability under governmental immunity when the bus driver held one of the students (who apparently was the nonaggressor)[86] in an altercation so that the other student took advantage of the situation and struck the student being held in the eye. Missouri Statutes created an exception to governmental immunity for:

> Injuries directly resulting from the negligent acts or omissions by public employees arising out of the operation of motor vehicles within the course of their employment.[87]

In what appears to be a rather narrow opinion the *Johnson* court held that the school district was shielded by governmental immunity because the driver's acts concerned the actions in the bus, not the operation of the bus.[88] However, even though the school district was immune from liability the bus driver was not because he had failed to

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82. 448 N.Y.S.2d 566 (N.Y. App. Div. 1982).

83. Schools cannot insulate themselves from tort liability by using private transporters. *See* Whittington v. Sorrela Tech. Inst., 438 So. 2d 236 (La. Ct. App. 1983), Caston v. Buckeye Union Ins. Co., 456 N.E.2d 1270 (Ohio Ct. App. 1982). The relationship between school bus service and private bus service is not close enough to prevent eligibility of a drivr for unemployment benefits when discontinued by school district and hired by private bus service. *See* Town of Milton v. Director of the Div. of Employ. Security, 438 N.E.2d 71 (Mass. 1982).

84. 363 N.E.2d 295 (Mass. Ct. App. 1977).

85. 631 S.W.2d 923 (Mo. Ct. App. 1982).

86. It is probably a long-standing and accepted common-law rule that a person coming to the assistance of another steps into the shoes of the person he assists. *See* Minnesota v. Merdiva, 25 Minn. 161 (1878).

87. MO. REV. STAT. § 537.600(1) (1978).

88. However, *see also* Van Dink v. Forest Hills Pub. Schools, 341 N.W.2d 310, 313 (Mich. Ct. App. 1983), where failure to instruct adequately a boy who speaks little English on how to cross a busy street was held not to apply to the "negligent operation of a motor vehicle."

follow the prescribed written school district guidelines.[89] It is worth noting that the reason the bus driver in *Johnson* was not also included within the governmental immunity was because he was "required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to his own judgment or opinion concerning the propriety of the act to be performed."[90] A somewhat similar result as in *Johnson* was reached in *Toeller v. Mutual Service Casualty Insurance Co.*[91] where a bus driver and his independent bus contractor employer were 93 percent negligent for the injury to a boy who had been suspended from the bus by the driver.[92] It was undisputed that the driver's actions were contrary to the accepted school district guidelines regarding the transportation of children. The right of school authorities to suspend unruly students from a school bus has been upheld, even when the suspension applied to all students on a bus route for five days.[93] Bus drivers are subject to established guidelines and failure to follow them may subject them to individual liability.

Occasionally, a bus driver may encounter a set of circumstances that require immediate response and then the bus driver's and school district's liability will be determined by the reasonableness of the driver's response. In *Sparrow v. Forsyth County Board of Education*[94] a student walking toward the front of the bus while the bus was still moving was injured when the driver suddenly applied the brakes after a snowball came through a open window and struck the driver on the side of the head. The driver jumped out of the bus, threw a snowball at the student who had hit him and upon reentering the bus found the injured student. The court determined the driver's throwing of a snowball to be, in effect, irrelevant to the question of negligence and found that in stopping the bus the driver

> acted as a person of ordinary care and prudence would have acted under similar circumstances. The snowball being thrown into the

89. The School District Transportation Handbook provided that, "The driver shall report disorderly conduct to the proper authority." *Supra* note 84 at 927.

90. *Id.* at 927.

91. 340 N.W.2d 923 (Wis. Ct. App. 1983).

92. There is no indication that the school district was ever made a party to this lawsuit.

93. Rose v. Nashua Bd. of Educ., 679 F.2d 279 (1st Cir. 1982). New Hampshire has a statute which permits a school superintendent "to suspend the right of pupils from riding in a school bus when said pupils fail to conform to the reasonable rules and regulations" of the board, N.H. REV. STAT. ANN. § 189:9-a (Supp. 1983), but even without the statute the board's action would probably have been upheld because the board conducted hearings and considered alternatives before it reached its decision.

94. 196 S.E.2d 762 (N.C. 1973).

bus in front of the driver brought about a sudden emergency which caused the driver to quickly stop the bus. There was, therefore no negligence on the part of the driver in stopping the bus suddenly.[95]

The *Sparrow* result needs to be compared with *Minton v. Saint Bernard Parish School Board*[96] where a child injured after running into the path of a school bus resulted in a $200,000 judgment against the school board. In *Minton*, a school bus driver noticing a group of children ahead near the road slowed his bus to 40-45 miles per hour. A child suddenly darted across the road followed by plaintiff, the bus driver swerved his bus but plaintiff panicked and ran into the path of the swerving bus. The driver and school board alleged a sudden emergency existed whereby the driver "had to make a choice between the safety of his passengers (by slamming on the brakes) and the safety of the pedestrians."[97] The court rejected this dichotomy as false because the bus driver's failure to apply the brakes and reduce speed more significantly when he first saw the children was the real act of negligence. By waiting unnecessarily to brake, the driver placed himself in the position of having to make a choice.

Where a court can find evidence of events during a bus trip that could reasonably be anticipated or foreseen, there is a strong likelihood the court will find negligence. In *Sharpe v. Quality Education, Inc.*,[98] the school bus operated by defendant's driver apparently had a history of mechanical malfunction, especially stalling. Rather than effect the necessary repairs, defendant's solution was to furnish the bus with a set of jumper cables. On the date when plaintiff was injured, defendant's bus had stalled three times during the morning run. After the third time the bus stalled, the driver sent the oldest student across a divided four-lane highway to call the school. Plaintiff, a younger 9-year-old student, was told she could not cross the highway with the older student but then when she exited the bus the bus driver told the older student to hold her hand crossing the street. On the way back to the bus plaintiff was struck by a car when she stayed on the median while the older ran across. In rejecting arguments that plaintiff was contributorily negligent or that the driver of the car was an intervening cause, the court found that evidence existed that the driver and school could have reasonably foreseen the accident when they operated a bus which

95. *Id.*
96. 416 So. 2d 167 (La. Ct. App. 1982).
97. *Id.* at 168.
98. 296 S.E.2d 661 (N.C. Ct. App. 1982).

repeatedly had problems and when they allowed the plaintiff to cross the street after three warnings not to do so.[99]

The responsibility of school districts in establishing bus routes carries with it the duty to deliver the student to his designated bus stop[100] and to monitor the safety of students at the bus stop. In *Roberts v. Saint Bernard Parish School Board*[101] an appeals court reversed a summary judgment for defendant where a student was permitted by the driver to leave the school bus at a bus stop other than his regular stop. The student was injured while trying to cross the street, apparently after the bus had left. What made the set of facts particularly damaging for defendant was that the injured student's parents had repeatedly told the bus driver and the school superintendent not to drop the student at any place other than his assigned bus stop. Not only does allowing a student to leave a bus wherever he may decide defeat the purpose of establishing designated bus stop locations, but it frustrates parents who entrust their child to the care of the school "not only during school hours, but also while he [is]riding to and from school in a School Board bus."[102] Of course, a parent might be able to authorize his child to be left at a different bus stop but a school district would be advised to never do so unless the bus driver is presented a note signed by the parent and approved by a school administrator. Such change of a bus stop should apply *only* to established bus stops, never to locations not designated as bus stops. Since the selection of bus stops involves consideration of student safety as well as effect on traffic patterns, leaving a student at an unauthorized drop point subverts the policies underlying the selection of bus stops.

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99. Since the appeals court's decision was to reverse the summary judgment for defendants, it was not necessary to reach the merits of the case.

100. Guidelines for determining bus routes may be established by statute for state departments of education, *e.g.*, IOWA CODE ANN. § 285.8 (West Supp. 1983-84); MINN. STAT. ANN. § 123.39(1) (West Supp. 1983), as well as local boards of education, *e.g.*, IOWA CODE ANN. § 285.11 (West Supp. 1983-84); FLA. STAT. ANN. § 234.02 (West Supp. 1983). Whether or not monitored by statute, the standard is clearly to locate and operate bus routes "for the protection of the health and safety of pupils transported." IOWA CODE ANN. § 285.8(3) (West Supp. 1983-84).

101. 427 So. 2d 676 (La. Ct. App. 1983).

102. *Id.* at 678. The *Roberts* court does not appear to recognize it but there is probably a difference in the degree of care owed to students in school and those on their way home. Generally, a school is not liable if a student entrusted to its care leaves school without authorization and is subsequently injured. Chavez v. Tolleson Elem. School Dist., 595 P.2d 1017 (Cal. 1979); Levandoski v. Jackson City School Dist., 328 So. 2d 339 (Miss. 1976); Brown v. North Carolina Wesleyan College, 309 S.E.2d 701 (N.C. Ct. App. 1983); *contra* Hoyem v. Manhattan Beach City School Dist., 585 P.2d 851 (Cal. 1978). Because school buses represent a smaller area to supervise and because egress is easier to monitor it would not be unexpected for school districts to be more responsible for leaving students at their appropriate bus stop.

The responsibility of a school district is generally considered to extend beyond the point of disembarkation to include the safety of the child if he must cross to the opposite side of the road.[103] It can reasonably be expected that failure of a bus driver to use the signal lights required by state statutes[104] to protect students as they cross a street will result in liability for the driver and the school district.[105] In an interesting case[106] where a student who had exited from one school bus and was struck and killed by another school bus as he crossed a busy street, a South Carolina court has recently held that the administrator of the child's estate could collect both under the maximum no-fault death benefit coverage and the damages coverage of the school district's insurance policy. The court found the administrator could recover $15,000 no-fault benefits because his son had been a lawful occupant of a bus and $15,000 damages because his death was due to the negligent operation of a second school bus.[107]

It is clear that following several basic rules, whether or not mandated by statute would help avoid many litigable problems. Schools need to use care in placing bus stops in areas where a stopped bus can readily be seen by approaching traffic and where students waiting for a school bus can likewise easily be seen. Bus stop lights should be used until after a student has boarded and is seated or until a disembarking student has reached the side of the road on which his house is located. Students should be prohibited from standing or moving about the bus while it is in motion. When discipline problems arise bus drivers must promptly inform the appropriate school officials; under no circumstances should bus drivers suspend troublesome students from buses unless authorized by transportation guidelines[108] and then only if school officials and parents are promptly notified.

## School Defenses in Transportation Litigation

School districts and their school officials have considerable liability for their transportation decisions and thus they should be

103. Johnson v. Scoboda, 260 N.W.2d 530 (Minn. 1977).

104. IOWA CODE ANN. § 321.372(1) (West Supp. 1983-84). "At the point of receiving or discharging pupils the driver of the bus shall bring the bus to a stop, turn off the amber flashing warning lamps, turn on the red flashing warning lamps, and extend the stop arm."

105. *See* Slade v. New Hanover Cty. Bd. of Educ., 178 S.E.2d 316 (N.C. Ct. App. 1971); Taylor v. Patterson's Admr., 114 S.W.2d 488 (Ky. 1938). *See also* IOWA OP. ATTY. GEN. (Dec. 5, 1980), (June 4, 1979), (Nov. 15, 1978).

106. Toney v. South Carolina Dep't of Educ., 309 S.E.2d 773 (S.C. Ct. App. 1983).

107. S.C. CODE ANN. § 59-67-710(1)(a)(b) (Law Co-op 1976).

108. A bus driver placing a student off at other than his regular stop may violate state law. *See, e.g.*, CAL. EDUC. CODE § 232.28(3) (West 1978). "The bus driver shall . . . not . . . put any pupil off the bus at other than the regular stop for that pupil, except by the order of the parent or the principal in charge of the school the pupil attends."

of defenses normally available to schools. Clearly any school is entitled to have adequate notice of claims against the district or any of its agents for acts alleged to have violated a statutory or common law standard. At least three critical legal questions arise when the issue of timely notice becomes important: whether the notice of claim was filed within the requisite number of days;[109] whether the notice was served on the right person;[110] whether failure to file within the required number of days or serve the right person is excusable under the circumstances.[111] Virtually all states specify by statute the number of days a claimant has to file notice of a claim. The purposes for timely notice of claims has generally been held to be

> to further legitimate interests by promoting prompt investigations; by providing the opportunity to repair any dangerous condition and for speedy and amicable settlement of meritorious claims; and to allow the opportunity to prepare to meet possible fiscal liabilities.[112]

In *Graves v. Rose*[113] a 23 month delay in the school district receiving actual notice of an injury and claim "prejudiced the School District's interest in prompt investigation while the evidence was fresh."[114] However, it is difficult to discern any consistent public policy as to what constitutes prejudice to a school district; presumably any late claim would affect the purposes for timely notice of claims quoted above. Thus where the statutory filing period has been exceeded courts become embroiled in weighing the plaintiff's reasons for non-timely

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109. OKLA. STAT. ANN. tit. 51 § 156B (West 1981) (filed within 120 days after the loss occurs); CAL. GOV'T CODE § 911.2 (West 1978) (filed not later than the 100th day after the accrual of the cause of the action).

110. OKLA. STAT. ANN. tit. 51 § 156B (West 1981) (filed with the clerk of the governing body of the political subdivision); CAL. GOV'T CODE § 945.4 (West 1978) "[N]o suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefore has been acted upon by the board, or has been deemed to have been rejected by the board."

111. *See supra* note 108 CAL. EDUC. CODE at § 911.4. States vary from those like Oklahoma which declare that a claim not filed within 120 days is "forever barred" to California which provides:

> (a) when a claim that is required by Section 911.2 to be presented not later than the 100th day after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim.
> (b) the application shall be presented to the public entity . . . with a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application.

112. Reirdon v. Wilburton Bd. of Educ., 611 P.2d 239 (Okla. 1980); Duesterhaus v. City of Edmond, 634 P.2d 720 (Okla. 1981).

113. 663 P.2d 733 (Okla. 1983).

114. *Id.* at 735. Oklahoma allows for a suit within 6 months of denial of a claim but such was not relevant in this case.

filing against the school district's allegations of prejudice. In *Duesterhaus v. City of Edmond*,[115] even though written notice of a claim was required by the statute, verbal notice to the political subdivision's attorney was considered to be substantial compliance when no prejudice could be shown. On the other hand, an accident report sent to the appropriate state agency was held to not establish actual notice to a local school district or its driver and a lawsuit for personal injuries against the school district and bus driver was dismissed.[116] But a written notice of claim sent to the clerk of the wrong political subdivision (city rather than school district) was held not to be prejudicial where attorney for claimant had also notified in writing the school district's insurer.[117]

Where no notice of any kind has been served on any party who could act reasonably to protect is valid interests, then courts tend to look at plaintiff's excuses for non-filing. A typical case is *Ebersol v. Cowan*.[118] In *Ebersol* a bus driver who had been bitten on her hand by one of her mentally retarded teenage passengers failed to file a claim within the statutory 100 day limit. Her injury resulted in at least five visits to a hospital over a three month period of time culminating in surgery and ongoing medical treatment for tissue degeneration. During the four months following the injury the bus driver contacted 9 different attorneys who either informed her she had no course of action or expressed no interest in her claim. On advice of a tenth attorney she finally presented her claim 127 days after the accrual of her course of action. Her claim was summarily denied by the school district and the denial was affirmed by the trial court. In reversing the trial court the California Supreme Court distinguished between this case where plaintiff "acted diligently to retain legal counsel within the 100-day limitation period"[119] and other "cases where the conduct of plaintiff's retained counsel was clearly unreasonable or inexcusably dilatory."[120] In addition the court noted that plaintiff

> sought to retain legal counsel to pursue her claim rather than undertake an independent investigation of the facts and the law of her own case.[121]

In other words, unless a school district can prove prejudice for a nontimely filing, courts may be willing to permit a claim to ripen into a

115. 634 P.2d 720 (Okla. 1981).
116. Graves v. Rose, *supra* note 112.
117. Conway v. Ohio Casualty Ins. Co., 669 P.2d 766 (Okla. 1983).
118. 673 P.2d 271 (Cal. 1983).
119. *Id.* at 277.
120. *Id. See also* nn.9-11 at 276-277.
121. *Id.* at 279.

possible legal course of action where a plaintiff who sought to work through the adversarial system would be denied any relief at all if the claim were not permitted.[122] However, a potential claimant whose delay was due to her attempt to investigate may find the claim denied altogether.

Even if a timely claim has been filed the most frequent defense of a public school district is sovereign immunity and the clear modern trend has been for legislatures to waive sovereign immunity to the extent of a school district's insurance coverage, with a maximum dollar amount frequently set.[123] In one recent interesting case where the state set a no-fault maximum for occupants of a school bus and a damages maximum for persons injured by negligent operation of a bus, a student struck by a school bus after he had just exited from another school bus was able to collect under both provisions.[124] The mere existence of insurance coverage does not affect the waiver of governmental immunity unless plaintiffs can

> plead either that the defendant's activity comes within one of the statutory exceptions to immunity or that the activity did not constitute the exercise or discharge of a governmental function.[125]

Where one of the exceptions relates to negligent operation of government owned vehicle, e.g., school bus, courts have held that failure to advise a student how to safely walk along a highway,[126] failure to place bus stop warning signs[127] and the act of bus driver in holding one student while another struck him[128] did not involve the operation of a school bus. Where statutes create liability for non-discretionary or ministerial governmental functions, the question for the court is whether the decision was planning (protected by governmental immunity) or operational (not protected). Unfortunately, the analysis by most courts in separating the two functions is little more than mere labeling.[129] Judicial distinctions appear to reflect fine (and frequently

122. The cause of action in *Eberal* is somewhat conjectural. California law is controlled by Tarasoff v. Regents of Univ. of California, 551 P.2d 334 (Cal. 1976), where a person, who knows of the dangerous propensities of a person for whom he has some supervisory responsibility, may be liable to third person for injuries caused by the dangerous person.

123. *See, e.g.*, SOUTH CAROLINA CODE § 59-67-710 (1976) ($15,000); OKLA. STAT. tit. 51 § 153 (1978) ($50,000).

124. Toney v. South Carolina Dep't of Educ., 309 S.E.2d 773 (S.C. Ct. App. 1983).

125. Van Dink v. Forest Hills Pub. Schools, 34 N.W.2d 510 (Mich. Ct. App. 1983).

126. *Id.*

127. Harrison v. Escambia Cty. School Bd., 419 So. 2d 640 (Fla. Dist. Ct. App. 1982); *contra* Brooks v. Woods. 340 P.2d 1000 (Okla. Ct. App. 1982).

128. Johnson v. Carthell, 631 S.W.2d 923 (Mo. Ct. App. 1982).

129. *See, The Discretionary Exception and Municipal Tort Liability: A Reappraisal*, 52 MINN. L. REV. 1041 (1968).

imaginary) gradations among various kinds of government acts with little attempt to invoke any consistent overriding public policy. The result has been decisions that frequently appear to conflict within the same jurisdiction[130] and do in fact conflict from one jurisdiction to the next.[131] The lesson for the plaintiff pressing a claim and for the school district alike is that the interpretation of government immunity may involve a very fluid judicial approach. Of course, the fact that a school district is immune from a suit does not necessarily mean that bus driver is also immune.[132]

Even where injured plaintiffs have filed a timely claim and where a cause of action is not barred by sovereign immunity, they can reasonably expect to face a wide range of legal defenses. One of the most frequently interposed defenses of school districts is the contributory negligence of the plaintiff. Where a jurisdiction has recognized comparative fault, appeals from trial court decisions focus on whether the trial court was correct in attributing a high percentage to an injured child[133] or whether a low percentge of fault assigned to vehicles other than school bus was correct.[134] However, where plaintiff's contributory negligence can serve as a total bar to any recovery, a court will scrutinize carefully the facts, frequently focusing on the age of the child as well as factors surrounding the accident. In *Sharpe v. Quality Education, Inc.*[135] an appeals court reversed a summary judgment for defendant bus company and held that the 10- or 11-year-old student "was not contributorily negligent as a matter of law."[136] Where the facts suggest that plaintiff was injected into a position of danger because of defendant's mechanically faulty school bus, as in *Sharpe*, courts appear loathe to see an injured child deprived of a hearing on his complaint by dismissal at the pleadings stage. In *Arnold v. Hayslett*[137] a Tennessee trial court after a lengthy trial found a deceased twelve-year-old to have been guilty of "remote contributory negligence"

130. *See* cases cited by the dissent in *Harrison v. Escambia Cty. School Bd.*, *supra* note 127 at 650.

131. Some jurisdictions recognize that government's immunity will not protect faults in designs or plans that are so obvious as to be inherently dangerous. Dodds v. West Liberty, 281 N.W. 476 (Iowa 1938); Gould v. Topeka, 4 P. 822 (Kan. 1884); Donnelly v. Ives, 268 A.2d 406 (Conn. 1970); Paul v. Faricy, 37 N.W.2d 427 (Minn. 1949).

132. Johns v. Carthell, *supra* note 128.

133. Branch v. Stehr, 461 N.Y.S.2d 346 (N.Y. App. Div. 1983). New trial awarded where jury verdict apportioned 90 percent fault to six-year-old child.

134. Toeller v. Mutual Serv. Cas. Ins. Co., 340 N.W.2d 923 (Wis. Ct. App. 1983). Appeals court upheld jury's determination that bus company was 93 percent negligent while truck owner that struck child and child were each only 1 percent at fault.

135. 296 S.E.2d 661 (N.C. Ct. App. 1982).

136. *Id.* at 662.

137. 655 S.W.2d 941 (Tenn. 1983).

that mitigated the amount of damages and awarded his next-of-kin $40,000. The Tennessee Appeals Court, with the Tennessee Supreme Court affirming, found plaintiff's conduct to have been the proximate or causative force of his death and thus reversed the award of damages.

There are a number of other defenses which appear in transportation cases. Normally the defense of intervening cause where a child is injured by a vehicle other than a school bus is left to be decided by the jury as to the percentage of fault in comparative negligence states[138] or as to the possibility of recovery at all in non-comparative negligence states.[139] The defense of sudden emergency can be interposed by a school district but it must appear from the facts that the injury could not have reasonably been foreseen and that the conduct of the district or the bus driver did not in fact contribute to the alleged emergency.[140] The question of effectivenss of a release signed by plaintiff is frequently left to the trier of fact, but there appears to be a trend towards appeals courts finding releases as a matter of law to be invalid on public policy grounds.[141] In one recent field trip case, a defendant school attempted to argue that the students on the field trip were involved in a joint venture, but the appeals court found, quite correctly, that field trips do not fit the definition of a joint venture.[142] Where state regulations require bus driver retirement at age 65, courts appear quite willing to accept statistical data indicating greater probability of accidents.[143] In an interesting recent non-liability case a new state law provided that, "School crossing guards shall be the responsibility of the local law enforcement agency having immediate jurisdiction of the crossing."[144] Although the school district had provided school crossing guards for 20 years, the district now sought to avoid responsibility by claiming the

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138. Toeller v. Mutual Serv. Cas. Ins. Co., *supra* note 134.

139. Sharpe v. Quality Educ., Inc., *supra* note 135.

140. Minton v. Saint Bernard Parish School Bd., 416 So. 2d 167 (La. Ct. App. 1982) (defense not successful).

141. Whittington v. Sowela Tech. Inst., 438 So. 2d 236 (La. Ct. App. 1983) (release invalid where injuries caused through instrumentalities in the exclusive control of the school); Porubiansky v. Emory Univ., 275 S.E.2d 163 (Ga. Ct. App. 1980) (release invalid because of school's superior bargaining power).

142. Whittington v. Sowela Tech. Inst., *supra* note 141.

A joint venture is an undertaking by two or more persons to combine their property, capital, labor or skill in any combination of these elements in the conduct of a particular line of trade or general business for joint profits, thus creating the status of a partnership, although the facts do not show a formal partnership. *Id.* at 246.

143. Ten Hoeve v. Board of Educ. of Dundee Cent. School Dist., 469 N.Y.S.2d 174 (N.Y. App. Div. 1983); Maki v. Commissioner of Educ. of N.Y., 568 F. Supp. 252 (N.D.N.Y. 1983).

144. School Dist. of the City of Pontiac v. Township of Bloomfield, 339 N.W. 465 (Mich. 1983).

local police department was the " local law enforcement agency." Although this case did not involve an injured plaintiff, it serves as a fitting conclusion to this section on school responsibility for transportation decisions by indicating that school districts are understandably interested in divesting themselves of potential areas of litigation.

# II.

# Duty to Transport Students

## Introduction

The duty to transport school children is generally established by state statutes.[145] Where so established, the state departments of education may maintain general supervision over the school transportation system in the state[146] but the responsibility for actually furnishing the transportation will fall upon local school districts.[147] Where a state has taken over the field of student transportation through mandatory and comprehensive legislation local governmental units will generally be unsuccessful in applying local regulations which work to restrict or prohibit carrying out the obligations.[148] The duty to transport students to and from school is frequently stated in the most expansive terms as a declaration of legislative public policy:

> In districts where the state provides aids for transporation it is in the public interest to provide equality of treatment in transporting school children of the state who are required to attend elementary and secondary schools ....[149]

## General Financial Considerations

Transportation of students represents a considerable financial outlay by local school districts and it can reasonably be expected that school districts will transport students, unless otherwise specifically mandated

145. Normally, in the absence of a statute a school district owes no duty to transport pupils regardless of the distance from which they come. Harwood v. Dysart Consol. School Dist., 237 Iowa 133, 21 N.W.2d 334 (Iowa 1946). *See* MINN. STAT. ANN. § 123.39 (West 1976). ("The board may provide for the free transportation of pupils to and from school...."); *see also* CAL. EDUC. CODE § 39800 (West 1978).

146. IOWA CODE ANN. § 285.8 (West Supp. 1983-84). State supervision is frequently tied to regulations for transporation allowances, CAL. EDUC. CODE § 41853 (West 1978).

147. *Id.* at § 285.10.

148. Bloomfield v. Davis Cty. Commun. School Dist., 254 Iowa 900, 119 N.W.2d 909 (1963) where municipality attempted to use zoning law to keep a school district from installing gasoline tanks to refuel its buses.

149. MINN. STAT. ANN. § 123.76 (West Supp. 1983). A state statute authorizing transportation of all students, public and nonpublic, has a legitimate secular purpose in promoting the safety and welfare of children. Americans United, Inc. v. Independent School Dist., No. 622, 179 (N.W.2d 146 (Minn. 1970).

to do so, only where their transportation expenses are reimbursed by the state. Transportation aid entitlement schemes are generally designed by state legislatures and are invariably complex. Transportation aid entitlement statutes typically have three aspects to them: first, there are a series of definitions which determine eligibility for aid-reimbursement;[150] second, there is a description of the formula to be used in calculating the amount of the reimbursement;[151] and third, there may be provisions for the possibility of increased aid adjustment in special situations.[152] Payment of transportation aid entitlements may be based on a combination of the amount of past outlays plus predicted costs for the next year with final adjustment for actual authorized expenditures made during the summer following the school year in question.[153] State reimbursement may also be based upon the relationship between expenses for the preceding year and tax levy necessary to raise that amount.[154]

As much as school districts would find it more financially feasible to operate bus routes at or near pupil capacity, schools cannot require that students use the buses.[155] On the other hand, school districts may be held to have operated in an arbitrary and unreasonable manner where they refuse to furnish transportation to students otherwise unable to attend school because it would be more expensive to transport those students than others.[156] However, state statutes generally grant local districts the option of transporting students or

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150. MINN. STAT. ANN. § 124.225(1) (West Supp. 1983-84). Included are such definitions as "transported full time equivalent pupil"; "total authorized cost" and "category of transportation of service" for which reimbursement is allowable. *See also* CAL. EDUC. CODE § 41855 (West 1978) where definitions for "excessive distance" and "relatively few pupils" are important because of special transportation allowances.

151. *Id.* at § 124.225(1a,3,4a) (using a regional multiple regression factor); FLA. STAT. ANN. § 236.083(2) (West Supp. 1983) (using density index).

152. *Id.* at § 124.225(6) (inflation); § 124.225(7a) (softening formula); § 124.225(8b) (excess handicapped aid).

153. *See id.* at § 124.225(9).

154. CAL. EDUC. CODE § 41857, 41858, 41859 (West 1978). The reimbursement scheme increases the percentage of transportation expenses reimbursed commensurate with increase of tax levy necessary to meet transportation expenses. Presumably this system is an attempt to relate reimbursement to ability of school districts to provide transportation services, rather than simply reimburse on an across-the-board dollar basis. *See also* ILL. STAT. ANN. ch. 122 § 29-5 (Smith-Hurd Supp. 1981-82). Unequal educational expenditures per student, based upon the variable property values at tax rates of local school districts, do not amount to invidious discrimination. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

155. *See, e.g.*, CAL. EDUC. CODE § 33350 (West 1978). "No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian."

156. Manjares v. Newton, 49 Cal. Rptr. 805, 411 P.2d 901 (1966).

providing payment to parents in lieu of transportation.[157] Eligibility for school transportation is most often tied to distance from the school,[158] and thus any financial reimbursement of parents in lieu of transportation would generally apply only to those beyond the maximum statutory walking distance. State reimbursement for transportation expenses is determined according to a statutory dollar amount or rate scheme,[159] but it is possible for students within the statutory walking distance to qualify for reimbursement, such as those students designated as handicapped[160] and those for whom walking conditions would be hazardous.[161] Where a parent makes a claim for reimbursement, both proof of the duty to transport and obligation to reimburse belong to the parent.[162] Even beyond the maximum statutory walking distance it may be possible for a local board to make payments in lieu of transportation where roads are too poor for buses to travel.[163]

Because of the expense involved with transportation, school districts may attempt to defray their costs by charging bus users. The general

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157. The option exists unless transportation is mandated by other statutes or court orders, *e.g.*, in the cases of handicapped students and desegregation orders. *See* Hurry v. Jones, 560 F. Supp. 500 (D.R.I. 1983); Washington v. Seattle School Dist. No. 1, 102 S. Ct. 3187 (1982).

158. Statutes generally specify the maximum walking distance before bus transportation will be provided. *See* FLA. STAT. ANN. § 236.08(1)(a) (West Supp. 1983) (2 miles); IOWA CODE ANN. § 285.1(1)(a)(b) (West Supp. 1983-84) (2 miles for elementary; 3 miles for high school); ILL. STAT. ANN. ch. 122 § 29-3 (Smith-Hurd Supp. 1981-82) (1½ miles). The manner in which the distance is to be measured is likewise frequently determined by statute. *E.g.*, IOWA CODE ANN. § 285.1(9) (West Supp. 1983-84): "Distance to school or to a bus route shall in all cases be measured on the public highway only and over the most passable and safest route as determined by the area education agency board, starting in the roadway opposite the private entrance to the residence of the pupil and ending in the roadway opposite the entrance to the school grounds or designated point on bus route." *See also* ILL. STAT. ANN. ch. 122 § 29-3 (Smith-Hurd Supp. 1981-82). In an interesting attorney general's opinion, the Minnesota Attorney General interpreted the Minnesota statute to require the distance to be measured over the most direct public road, not "as the crow flies." Op. Atty. Gen. 166a, Aug. 25, 1961. Certain classes of persons such as the handicapped for whom transportation at any distance would be required under the federal handicapped act may be excluded from the statutory distance requirement. *See* MINN. STAT. ANN. § 124.223(4) (West Supp. 1984).

159. *E.g.*, IOWA CODE ANN. § 285.1(3) (West Supp. 1983-84) sets the reimbursement amount at $80 per child plus 75 percent "of the difference between $80 and the previous school year's statewide average per pupil transportation cost, as determined by the department of public instruction." California allows reimbursement "not to exceed the cost of actual and necessary travel" but then limits any payments to an amount determined by the local school district to be its cost of transportation. CAL. EDUC. CODE § 39806 (West 1978).

160. MINN. STAT. ANN. § 124.223(4) (West Supp. 1984).

161. ILL. STAT. ANN. ch. 122 § 29-5 (Smith-Hurd Supp. 1981-82).

162. Riechs v. Independent School Dist. of Danbury, 257 N.W. 546 (Iowa 1935); Bruggeman v. Independent School Dist. No. 4, Union Twp., Mitchell Cty., 289 N.W. 5 (Iowa 1940); Tow v. Dunbar Consol. School Dist., 206 N.W. 94 (Iowa 1926).

163. IOWA CODE ANN. § 285.1(4) (West Supp. 1983-84); FLA. STAT. ANN. § 234.061 (West Supp. 1983).

rule seems to be that a district cannot charge a fee for transportation that is reimbursable from state transportation aid funds.[164] Just which expenses are reimbursable is always a matter of state law and reimbursement may apply to field trips,[165] extracurricular activities[166] any school sponsored activity[167] or transportation of nonpublic students.[168] However, where district owned buses are used to transport students in non-reimbursable situations[169] or are used to transport non-student groups,[170] fees can be charged for use of the buses utilizing a variety of bases for charges.[171] Where school districts transport students within the maximum statutory walking distance there is a difference of opinion whether the local district can charge a fee for such a service.[172] Transportation of handicapped students may involve special obligations by a school district[173] as well as special terms of state aid reimbursement.[174]

## Funding of Transportation

Because of the high cost of financing transportation local school districts may face having to cut back educational programs where a state legislature has not authorized sufficient funds for aid

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164. *See* MINN. STAT. ANN. § 120.74(j) (West Supp. 1984); ILL. STAT. ANN. ch. 122 § 29-5 (Smith-Hurd Supp. 1981-82); CAL. EDUC. CODE § 3980.75 (West Supp. 1983).

165. MINN. STAT. ANN. § 120.73(1)(g), 120.74(1)(c) (West Supp. 1984).

166. *Id.* at § 120.73(j).

167. ILL. STAT. ANN. ch. 122 § 29-3.1 (Smith-Hurd Supp. 1981-82).

168. MINN. STAT. ANN. § 124.223(10) (West Supp. 1984).

169. *E.g.*, transportation to and from summer school. ILL. STAT. ANN. ch. 122 § 29-3.2a (Smith-Hurd Supp. 1981-82); transportation of non-resident students, IOWA CODE ANN. § 285.1(11).

170. *E.g.*, transportation of senior citizens, CAL. EDUC. CODE § 39840.5 (West 1978); transportation of pupils to harvest during national emergency, *id.* at § 39836, transportation for recreational, cultural, educational or public service programs, ILL. STAT. ANN. ch. 122 § 29-3.4 (Smith-Hurd Supp. 1981-82), or simply transportation of adults in general, FLA. STAT. ANN. § 234.211(1a) (West Supp. 1983).

171. FLA. STAT. ANN. § 234.211 (West Supp. 1983) ("reimbursement ... in full or in part"); CAL. EDUC. CODE § 39801.5 (West 1978) ("all or part of the costs"); ILL. STAT. ANN. ch. 122 § 29-3.4 (Smith-Hurd Supp. 1981-82) ("Amount equal to the cost ... includ[ing] a reasonable allowance for insurance premiums and depreciation of the vehicles so used."). 172. Minn. Op. Atty. Gen., 166-A-7, Nov. 29, 1969. (Fees cannot be charged); ILL. STAT. ANN. ch. 122 § 29-2 (charge can be made "not to exceed the cost thereof"); IOWA CODE ANN. § 285.1(11) (Supp. 1983-84) ("pro rata cost of transportation" of non-resident students may be collected from parents). *See* Silver Lake Consol. School Dist. v. Parker, 29 N.W.2d 214 (Iowa 1948) (nonpublic student could not be transported free where more than statutory walking distance from nearest public school but within that distance from his nonpublic school).

173. ILL. STAT. ANN. ch. 122 § 14-108, 14-701 (Smith-Hurd Supp. 1981-82) (responsibility to transport handicapped within school district or to schools outside district).

174. CAL. EDUC. CODE § 41863 (West 1978) (reimbursement according to specific dollar amount per unit of average daily attendance, rather than a percentage related to tax levy).

reimbursement[175] or local taxpayers have refused to approve millage increases. Where a local district cuts back or eliminates bus transportation for students within the statutory maximum walking distance because of inadequate funds, there are two critical legal questions raised: (1) whether the responsibility to transport is permissive or mandatory; (2) if permissive, whether failure to transport violates equal protection of the laws. In *Lintz v. Board of Education, Alpena Public Schools*,[176] a local school board voted to stop providing student transportation after voters had failed to approve a separate mill proposal. Prior to reaching its decision the board had met and had balanced the funding of $800,000 for transportation against the alternatives, "increased class sizes, reduction of counseling, and cutbacks in libraries, new supplies and books."[177] The trial court ordered reinstatement of bus transportation, holding that such a responsibility flowed from a state constitutional duty: "The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law."[178] In reversing the trial court, an appeals court did observe that "under the Michigan Constitution, the citizens of this state have a fundamental right to a free public education,"[179] but that such a "right to a free education is limited by other language found in Const. 1963, art. 8, sec. 2: 'The Legislature may provide for the transportation of students to and from any school.' "[180] In determining that the provision of student transportation was permissive and not mandatory, the appeals court held "that the Board of Education did not abuse its discretion in deciding to stop providing transportation to and from school, in light of the shortage of funding."[181] However, the appeals court concluded its opinion with a significant policy statement that reflects the tensions between legislative matters of funding and judicial enforcement of alleged rights violations:

> The voters of Alpena and Presque Isle have persistently refused to authorize sufficient funding to support both an adequate education system and a school transportation system. We are disturbed by the prospect that the burden of this policy decision may fall disproportionately upon a minority of rural families who are politically

175. A state legislature can key provision of transportation services to legislative appropriation. *See* IOWA CODE ANN. § 285.2 (Supp. 1983-84) where local districts are required to provide transportation services to nonpublic school pupils only "when the general assembly appropriates funds to the department of public instruction for the payment of claims . . . ."
176. 325 N.W.2d 803 (Mich. Ct. App. 1982).
177. *Id.* at 805.
178. MICH. CONST. art. 8, sec. 2.
179. *See supra* note 176 at 805.
180. *Id.*
181. *Id.* at 806.

> powerless to alter the situation. Be that as it may, it is the responsibility of the Legislature—and not the judiciary—to remedy any such inequity.[182]

In *Sutton v. Cadillac Area Public Schools*,[183] the same Michigan Court of Appeals rejected a challenge by parents that failure by a local school district to provide bus transportation violated equal protection of the laws under the federal and state constitutions. In rejecting the application of a strict-scrutiny-compelling state interest test, the appeals court cited the federal constitution principle that education is not a fundamental right[184] and concluded that: "Allocation of a school district's limited funds to education-related matters other than transportation is not irrational. Equal protection does not require that government choose between attacking every aspect of a problem or not attacking the problem at all."[185]

In *Shaffer v. Board of School Directors*,[186] a federal district court likewise held that a school district's decision to provide one-way instead of two-way transportation to kindergarten did not violate the due process and equal protection rights of indigent parents. However, the court ordered two-way transportation because state statutes required safe and effective transportation to meet student needs and one-way transportation did not meet those needs.

One of the results of inadequate transportation funding may be the reallocation of local funds. In *Ryan v. City of Philadelphia*[187] taxpayers sought to invalidate a $3,000,000 transfer of city general revenue funds to fund school busing.[188] The *Ryan* court found that providing school busing to protect citizens' health, safety and welfare was clearly a valid municipal function. Where local boards have failed to provide bus service because of impassible roads one state court interpreted its state constitution's provision for "a thorough and efficient system of free schools"[189] to provide adequate access to that education and fashioned an extraordinary order which included in part an obligation to: "(1) Devise alternative bus routing to increase access to transportation for petitioner's children during inclement weather; (2) provide shelters for the affected school children in conjunction with the alternative bus

182. *Id.*
183. 323 N.W.2d 582 (Mich. Ct. App. 1982).
184. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
185. *See supra* note 183 at 584.
186. 570 F. Supp. 698 (W.D. Pa. 1983).
187. 465 A.2d 1092 (Pa. Commw. Ct. 1983).
188. The basis for taxpayers' complaint was part of state's Home Rule Act which prohibited municipalities from regulating education. *See* PA. STAT. ANN. tit. 53, § 13219(a)(2).
189. W. VA. CONST. art. 12 § 1.

routes . . . ."[190] The same court had earlier held that providing access of children to free public schools may even require purchase of a larger school bus to traverse difficult roads.[191] While a school district may understandably want to assist parents in providing bus transportation for their children, it is important that local districts provide such assistance according to state statutes. In *Hartley v. Berlin Local School District*[192] a local school board had provided payments in lieu of transportation to a number of parents whose children lived along the public school bus route but who attended a nonpublic school in an adjacent district. However, payment in lieu of transportation was permissible only where the state board of education had confirmed upon petition by the local board that transportation was unnecessary or unreasonable. The *Hartley* case did not concern the denial of reimbursement funds to the local board but the case does serve as a warning to local districts to make certain they satisfy state reimbursement requirements before they expend funds.

Ideally, local school districts would probably prefer the option to determine whether to provide bus transportation or to make payments to parents in lieu of transportation. In *State ex rel. Stephan v. Board of Education*[193] a local school district calculated the cost of providing bus transportation to be $350,000 to $500,000 and voted to end bus service. Two thirds of parents responding to a questionnaire favored mileage reimbursement over busing but the state's attorney general had issued a formal opinion advising the board that it had an affirmative duty to provide bus transportation. The state supreme court resolved the conflict by finding that the state statute left the decision solely in the discretion of the local board whether to operate bus routes, to enter into mileage reimbursement contracts, or to do both. However, if a local school board abuses its discretion it may be responsible for damages. In *Hurry v. Jones*[194] a local school district refused for 3½ years to provide school transportation to a child handicapped with cerebral palsy. Eventually the district instructed the parents that home instruction would be provided but no notice of a hearing regarding this change of educational placement was furnished. Because the parents were unable to maneuver their child in and out of their van and because periods of time waiting in

190. Potter v. Miller, 287 S.E.2d 163, 165 (W. Va. 1982). The transportation problem in this case was exacerbated because children's absences occasioned by the bad condition of the roads were considered under state law to be unexcused.

191. Shrewsbury v. Board of Education, Cty. of Wyoming, 285 S.E.2d 767 (W. Va. 1980).

192. 433 N.E.2d 171 (Ohio 1982).

193. 647 P.2d 329 (Kan. 1982).

194. 560 F. Supp. 500 (D.R.I. 1983).

the van for one parent to get off work caused deterioration in the child's physical condition, the parents sought damages against the school district on a number of different theories: reimbursement for transportation services provided by parents, compensatory damages for the child's loss of enjoyment of life, money damages for violating the child's rights under Section 504 of the Rehabilitation Act of 1973, damages under Section 1983 of the Civil Rights Act, and recovery of attorney fees. Recovery was granted under all theories except the Section 1983 claim, which the court denied because Section 1983 cannot be used to enforce rights adequately protected under the Education for All Handicapped Children Act (EAHCA).[195] The court found transportation to be a "related service" required under EAHCA[196] and because of the bad faith failure of the school district to recognize the child's rights the court awarded damages to plaintiffs of almost $20,000 plus reasonable attorney's fees and costs.

## Transportation of Nonpublic Students

Since the United States Supreme Court upheld the right of a state to provide transportation or reimbursement in lieu of transportation to nonpublic students,[197] such transportation has been subject to a number of state and federal constitutional challenges. Transportation of nonpublic students has survived challenges under state constituion prohibitions against gifts of public money for private schools.[198] State courts have consistently interpreted their own constitutions very narrowly to mean that transportation services go to the students and "any benefit that may inure to the nonprofit private institution is merely incidental."[199]

However, the absence of significant constitutional prohibitions against transportation of nonpublic students has not meant that the area has been immunized from litigation. A frequent source of litigation involves attempts by local districts to utilize transportation arrangements for nonpublic school students other than public school

195. *Id.* at 509. *See also* Carey v. Piphus, 435 U.S. 247 (1978).
196. 20 U.S.C.A. § 1401(17).
197. Everson v. Board of Educ., 330 U.S. 1 (1947).
198. Board of Educ. School Dist. No. 142, Cook Cty v. Bakalis, 289 N.E.2d 737 (Ill. App. Ct. 1973); Broker v. Baker, 73 Cal. App. 2d 653 (1946) ("to or in aid of any religious sect", ... "for the support of any sectarian or denominational school"), CAL. CONST. art. 4 § 30 and art. 9 § 8); Gurney v. Ferguson, 122 P.2d 1002 (Okla. 1942) ("directly or indirectly, for the use, benefit or support of any sect, church ..."); OKLA. CONST. art. 2 § 5; Matthews v. Quinton, 362 P.2d 932 (Alas. 1961) ("for the direct benefit of any religious or other private educational institution"); ALASKA CONST. art. 7 § 1.
199. Nebraska v. School Dist. of City of Lincoln, 320 N.W.2d 472, 476 (Neb. 1982).

buses. The conflict invariably arises because state legislatures have declared that students attending nonpublic schools within the district are to be treated the same as, or similar to, public school students.[200] In *St. John Vianney School v. Board of Education of School District of Janesville*,[201] five private schools located in the city of Janesville sought to compel the school board to furnish the same door-to-door bus service for nonpublic elementary students more than two miles from school as was provided public and nonpublic school students less than two miles. The state statute required that there be "reasonable uniformity in the transportation furnished such pupils whether they attend public or private schools."[202] Under a legislative "city option" provision, the city had elected to provide free transportation to all public and private school children more than two miles from school "either through the Janesville Transit System buses or through an individual contract with the child's parent or guardian."[203] The trial court found that private school children using city buses were exposed to greater hazards than those children within the two miles who had door-to-door service and therefore there was not "reasonable uniformity." In reversing the trial court, the appeals court observed that the "reasonable uniformity required is directed at the distance pupils are transported and not at the means of transportation chosen."[204] The appeals court went on to justify in the following manner any inequities its interpretation might create:

> Public schools usually serve neighborhood. Private schools may serve much larger areas, even entire municipalities. As a result, the average distance that pupils live from their public schools may be substantially less than the average distance pupils live from their private schools in the same city.[205]

However, not every state would deny that a distinction can be made in transporting students between those in public and nonpublic schools. In *Janasiewicz v. Board of Education of the County of Kanawha*,[206]

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200. IOWA CODE ANN. § 285.1(14) (Supp. 1983-84) ("Resident pupils attending a nonpublic school located either within or without the school district of the pupil's residence shall be entitled to transportation on the same basis as provided for resident public school pupils under this section."); CAL. EDUC. CODE § 39808 ("Transportation upon the same terms and in the same manner and over the same routes of travel as is permitted pupils attending the district schools."); *see also* ILL. STAT. ANN. ch. 122 § 29-4 where a public school district is authorized to operate separate bus routes for nonpublic students where such routes would be "safer, more economical and more efficient".
201. 336 N.W.2d 387 (Wis. Ct. App. 1983).
202. WIS. STAT. ANN. § 121.54(1) (West 1983).
203. *See supra* note 201 at 389.
204. *Id.* at 393.
205. *Id.* at 394.
206. 299 S.E.2d 34 (W. Va. 1982).

parents of parochial students sought an order for the county board of education to provide school bus transportation for their children to and from parochial schools. State statute required that "adequate means of transportation" be provided "for all children of school age."[207] In ruling that the county need only provide "a full monetary stipend and permission to ride school buses on regularly scheduled (public) bus routes,"[208] the court found that there is a rational basis for distinguishing between public and parochial school children. "All children under sixteen years old are required to attend approved schools; but a parochial school student has chosen to reject a free public school education in favor of a privately paid education emphasizing religious beliefs and principles."[209] Where a state statute requires that nonpublic students be transported on the same basis as public school students, it is important for public school districts to understand that such equivalency might apply within the maximum statutory walking distance as well as beyond that distance. In *State of Nebraska ex rel. Bouc v. School District of the City of Lincoln*[210] a state statute provided in part that a public school district which furnished transportation to public school children must also furnish transportation facilities for nonpublic school children. There was no question that the school district had to provide transportation for public school children beyond the 1¼ mile limit, but it had refused to transport similar nonpublic school students on the same route. The state supreme court held that the clear legislative intent was to provide the same benefits to nonpublic students as were provided public students and therefore bus service had to be furnished.

Occasionally though, it might be possible that providing the same benefits to nonpublic and public school children may run afoul of the establishment clause. In *Members of the Jamestown School Committee v. Schmidt*[211] a federal appeals court had to decide the constitutionality of a state statute which provided for transportation of sectarian students beyond school district limits. The state statute provided in substance that a public school district in which children resided would provide transportation to and from the childrens' schools (public and nonpublic alike) only if the children "live at such distances from the schools which they attend as to make it unpractical or hazardous to

207. W. VA. CODE § 18-5-13(6)(a).
208. *See supra* note 206 at 38.
209. *Id.*
210. 320 N.W.2d 472 (Neb. 1982).
211. 699 F.2d 1 (1st Cir. 1983).

require [them] to walk to school."[213] By allowing interdistrict transportation for nonpublic students the district court found the law violative of the establishment clause because the law "provides sectarian school children with 'greater options at greater public expense than their public school counterparts' and administrative contacts to coordinate the program together with the risk of political division along religious lines created 'an excessive entanglement of church and state.' "[213] In reversing the district court, the court of appeals concluded that:

> So long as public and sectarian children are bused *to their own schools*, and the same standard of remoteness applies to public and sectarian students alike, the fact that public students are ordinarily ineligible for busing to schools beyond district lines does not render [the statute] invalid under the Establishment Clause or the Equal Protection Clause.[214]

However, the court did add one caveat that the differences in expenditures between the relative costs of busing nonpublic as opposed to busing public school students may "become so grossly disproportionate as to breed political divisiveness along religious lines.[215]

A decision by a parent to place his child in a private school may find that certain transportation expenses are not reimbursable. In *Bales v. Clarke*[216] a parent placed his handicapped child in a private out-of-state school for handicapped children because the child's resident public school district allegedly had failed under both the state and federal statutes to provide a "free appropriate public education."[217] In denying the parents' request for reimbursement for transportation expenses to visit their child the court observed that "neither the Virginia statute, the Virginia regulations, nor the federal act provide funding expenses for parents' transportations."[218]

## Transportation for Special Student Needs

Although, as indicated above, there are no funds required for parental transportation, federal and state handicapped legislatures may require public school districts to provide transportation for handicapped

212. R.I. GEN. LAWS § 16-21.1-1.
213. *See supra* note 211 at 3, quoting Members of the Jamestown School Comm. v. Schmidt, 525 F. Supp. 1045 (D.R.I. 1981).
214. *Id.* at 8. Not every federal court would agree with the statement. *See* Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955 (D.D.C. 1976) where transporting students to a nonresident district school was held to violate the establishment clause.
215. *Id.* at 10.
216. 523 F. Supp. 1366 (E.D. Va. 1981).
217. 204 U.S.C.A. § 1412(a); VA. CODE § 22.1-214(A).
218. Supra note 216 at 1370.

children. In *Department of Education, State of Hawaii v. Katherine D.*[219] parents of a child with tracheomalacia[220] wished to have their child educated in a regular education class in a public school, with itinerant special education speech and language services provided as well. However, her parents would permit their daughter to attend the public school only if there were trained persons to respond to her health needs, mainly to suction excess mucus from her lungs, if necessary; to administer medication before she eats lunch; and to reinsert her tracheotomy tube should it become dislodged. The state department of education recommended home instruction for the child since the public school did not have the continuous services of a medically trained person should an emergency situation arise.[221] That offer by the public school district was found by a hearing officer to not be "a 'free appropriate education' in the 'least restrictive environment.' "[222] In ruling on behalf of the child against the state department of education, the federal district court held "the DOE (department of education) must pay for a private school placement when such assistance is available at no cost at a private school and Katherine D. can then avoid the confirming and adverse impact of a home tutoring program."[223] In addition to requiring the public school district to pay tuition to a private school, the federal court held that "Katherine D. is entitled to transportation and a school-based education with special attendants at DOE expense."[224]

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219. 531 F. Supp. 517 (D. Hawaii 1982).

220. This condition means that the walls of the windpipe are floppy and not rigid. The child in this case had had a tracheotomy with the tracheotomy tube held in place by surgical strings. The tube enabled her to breathe and expel secretion from her lungs.

221. This case highlights the tensions which exist between attempts to place handicapped children in the "least restrictive environment" and uncertainty by school personnel whether they can or should perform medical procedures possibly necessary to save a life. In *Katherine D.* the administrators and three teachers in the public school to which the child was to be assigned filed a grievance through their union "charging violation of their contracts of employment by being required to perform duties of a medical nature outside the scope of their contractual duty." *See supra* note 219, at 524. For a discussion of medical procedures by improperly trained personnel, *see* R. MAWDSLEY & S. PERMUTH, LEGAL PROBLEMS OF RELIGIOUS AND PRIVATE SCHOOLS (NOLPE Monograph 1983) at 18-20.

222. *See supra* note 219, at 523.

223. *Id.* at 526.

224. *Katherine D.* highlights the hard choice public school districts may have to make in financing private education for handicapped children where their own personnel are unable or unwilling to learn some basic medical techniques because of fear of legal liability. The federal court emphasized "that the aid *Katherine D.* needs can be—and for some years has been—provided by trained lay people; that the necessary skills can be learned at no cost in a matter of hours." It may well be that public school personnel will learn some of these trainable procedures only when budgetary pressures on salaries or programs finally force them to.

**Pupil Transportation**

In *Fallon v. Scotch Plains-Fanwood Board of Education*[225] a state court addressed a different kind of handicapped child situation with implications involving pupil transportation. In *Fallon* plaintiff-parents had placed their child in a private day school for neurologically impaired children because the public school district where the child had attended for 9½ years had refused to change the child's classification "from 'multiply handicapped,' with her primary handicap being educable mentally retarded, to 'neurologically impaired.' "[226] Plaintiffs sought $16,000 reimbursement for 2½ years expenses at the private school. The issue before the court was whether the lack of responsiveness of the public school district to plaintiff's requests justified placement in the private school.[227] In addition to reimbursement for the amount of tuition, the public school district was responsible to reimburse "transportation costs ... for the actual amount of expenses."[228] Public school districts should take note though that because this school district's refusal to reimburse the parents was "substantially unwarranted and unreasonable,"[229] the school district was ordered to pay interest on the sum to be reimbursed for 2½ years (a total of $3926). Although there are divergent views as to whether money damages are included among the types of relief available to redress a Section 504 grievance under the Rehabilitation Act,[230] there appears to be a developing trend to recognize such a remedy.[231] In *Hurry v. Jones*[232]

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225. 447 A.2d 607 (N.J. Super. Ct. App. Div. 1982).

226. *Id.* at 608.

227. The issue of exhaustion of remedies is very important under the Education for All Handicapped Children Act. The general rule is that parents of a handicapped child will not be reimbursed for costs of the child's private schooling incurred during the pendency of administrative proceedings to determine appropriate placement. Newport-Mesa Unified School Dist. of Orange Cty. v. Hubert, 183 Cal. Rptr. 334 (Cal. Ct. App. 1982); Stacy G. v. Pasadena Indep. School Dist., 695 F.2d 949 (5th Cir. 1982); Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982); Calhoun v. Illinois State Bd. of Educ., 550 F. Supp. 796 (N.D. Ill. 1982); *Contra* Blomstrom v. Massachusetts Dep't of Educ., 532 F. Supp. 707 (D. Mass. 1982); where parents chose a private program for the child not totally appropriate, they will get reimbursement under the EAHC Act only for the appropriate portion. However, in *Fallon* there was no question regarding the appropriateness of the placement. *See supra* note 225 at 608.

228. *See supra* note 225 at 608.

229. *Id.* at 611.

230. 29 U.S.C.A. § 794.

231. Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982), *cert. denied*, __ U.S. __, 103 S. Ct. 215 (1963); Gregg B. v. Board of Educ. of Lawrence School Dist., 535 F. Supp. 1333 (E.D.N.Y. 1982); Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980); Hutchings v. Erie City and Cty. Library Bd. of Directors, 516 F. Supp. 1265 (W.D. Pa. 1981); *Contra* Ruth Anne M. v. Alvin Indep. School Dist., 532 F. Supp. 460 (S.D. Tex. 1982); Boxall v. Sequoia Union School Dist., 464 F. Supp. 1104 (N.D. Cal. 1979).

232. *See supra* notes 194-196 and accompanying text.

a substantial damage award to a handicapped child was tied to the public district's failure to provide appropriate transportation to school:

> George was denied services to which he clearly was entitled because of his handicap. The undue delay in providing appropriate transportation for George initially caused the child severe discomfort while spending hours in his father's van each afternoon, and a loss of sleep because of the resulting muscle pain. Ultimately, George's physical and self-help skills regressed because he was totally without physical or occupational therapy from December of 1977 through June of 1979. George is awarded the sum of $5,000 as compensation for those injuries.[233]

## Transportation for Purposes of Desegregation

There are few legal remedies that can generate the range of human emotions which court-ordered busing does. One federal district court recently expressed the dilemma in the following manner:

> In school desegregation cases the phrase mandatory busing invariably results in a highly emotional response. The question of mandatory busing is perhaps the single most divisive issue in any school desegregation plan. It certainly presents the greatest single hurdle to community acceptance of a plan of desegregation. Few ideas are more readily calculated to lead to public resistance of a plan than the thought of small children being forced to travel great distances away from their homes.[234]

Clearly the most controversial desegregation cases raising transportation issues are those where courts have ordered multi-district desegregation. Such cases have lengthy histories of protected litigation. The case of *Hoots v. Commonwealth of Pennsylvania*[234] is such an example. In *Hoots* five school districts, four overwhelmingly white and one predominantly black, were ordered to be consolidated into one desegregated district as remedy for intentional racial segregation in creating the predominantly black district east of Pittsburg. One of the school board's final proposals prior to court-ordered inter-district busing was to basically bus blacks from their neighborhood schools to nearby largely white schools. The court's two reasons for rejecting the plan were that:

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233. *See, supra* note 194 at 512.

234. Hoots v. Commonwealth of Pennsylvania, 539 F. Supp. 335 (W.D. Pa. 1982).

235. *See* Hoots v. Commonwealth of Pennsylvania, 672 F.2d 1107, 1109-10 (3d Cir. 1982) where between 1973 and 1981 there had been an incredible eight different reported cases of the same names, referred to as Hoots I through VIII.

> (1) [T]he plan generally speaking provides for only one-way busing of black students away from their neighborhoods to white schools, while white students remain in their former neighborhood schools,[236]
>
> (2) [T]he alienation which results when groups of children are continually split apart and shuttled between schools with differing student bodies will fall primarily on black students, while white students continue their education as a cohesive group.[237]

As an alternative to the board's plan the court adopted one of plaintiff's proposals employing a clustering technique involving "linking contigous elementary schools together to form a compact attendance zone."[238] As a result of using the clustering technique the court observed that "the distances between schools are minimized" and "the distance students must be transported is also held to a reasonable limit."[239] The court determined that the maximum one-way distances traveled of 7.2 miles or time on a bus of about 20 minutes for any child was not excessive.[240] The court appeared justified by its plan because even under the segregated system "a substantial number of public school students in the present district (were) bussed" and the consolidation did not result in "any large increase in total mileage or numbers of students transported."[241]

Where local school districts are subjected to increased expenses in multi-district transportation, federal courts can order states to reimburse local districts for all or part of those expenses. In *Berry v. School District of City of Benton Harbor*[242] a federal district court approved a voluntary transfer plan between a predominantly black city district and two largely white adjacent rural districts. In addition to ordering the three districts to design an interdistrict transportation plan, the state was ordered to pay two-thirds of the districts' desegregation transportation costs.

Not all desegregation plans necessarily require mandatory busing. In *United States v. Board of Education of the City of Chicago*[243] a school board plan to desegregate Chicago's largely black and hispanic public schools was upheld as constitutional even though mandatory busing was not included as part of the plan. The federal district court observed

236. *See supra* note 234 at 340.
237. *Id.*
238. *Id.* at 345.
239. *Id.*
240. *Id.* at 345-346.
241. *See supra* note 235 at 1122.
242. 554 F. Supp. 912 (N.D. Ill. 1983).
243. *Id.* at 925.

that "the inclusion of mandatory busing in a plan has importance to minority parents as evidence the plan is really committed to equal and non-segregated education for their children."[244] But in an unusually well-reasoned opinion exhibiting a remarkable blend of constitutional fairness with common sense the court went on to observe that "it would be ironic to require token transfers of white students to predominantly black schools to serve that purpose offensive to every minority group."[245] The court further noted that experiences with mandatory busing in comparable cities like Los Angeles, Boston and Detroit demonstrated that 40-45% of white students reassigned by transportation to minority schools can be expected to be lost to private or suburban schools, thus making meaningful desegregation even more improbable.[246] The court's preceptive grasp of the bridge between constitutional law and practical public policy is reflected by its assessment:

> Court involvement in school desegregation cases derives from the Equal Protection Clause. One obvious facet of equal protection of the laws is the extent to which a desegregation plan, required to address the right to equality of education, may itself impose disproportionate burdens on the already disadvantaged students participating in the plan.[247]

The relationship of court-ordered desegregation and demographics has recently been highlighted in *Ross v. Houston Independent School District*.[248] In *Ross* the racial composition within the city of Houston had changed substantially from 1970 when the first desegregation plan was entered into until the present day.[249] The city school district over a period of ten years had developed desegregation plans using pairing and busing and magnet schools.[250] The present cases arose in 1980 when the federal government sought to include 22 neighboring districts in a massive multi-districting plan. The federal district court denied the government's position and determined that "the district has eliminated the vestiges of de jure segregation in the composition of the student body of individual schools even though many schools are identifiably one-race."[251] In addition, the district court noted the past

244. *Id.* at 925-26.
245. *Id.* at 920.
246. *Id.* at 925.
247. *Id.* at 922.
248. 699 F.2d 218 (5th Cir. 1983).
249. *Id.* at 220. In 1970 the student population was 53.1% white, 33.5% black, and 13.4% hispanic. By 1978-79 the percentages were 30.8% white, 45% black and 24.2% hispanic. By 1985-86 the enrollment is projected to be 20% white, 38% black and 42% hispanic. *Id.* at 221, 222.
250. *Id.* at 224.
251. *Id.*

inadequacies of busing as a desegregation tool and decided that "there are not enough white students left in the district to effect greater integration of student bodies without untoward costs on the students themselves.[252] Where a school system has removed the vestiges of de jure segregation, the federal appeals court in *Ross* agreed with the district court's rejection of government demands for cross-district busing.[253] It would seem that *Ross* is indicating that the duty of school districts to transport students to achieve desegregation must be related to the causes of segregated schools. Busing of students is not necessarily a panacea and such a procedure must consider adverse effects upon the students themselves.

The negative response of the electorate in two states to mandatory busing has prompted two recent United States Supreme Court decisions. In *Washington v. Seattle School Dist. No. 1*[254] the Seattle School District had enacted the so called Seattle Plan for desegregation of its schools. The school district had first sought to achieve its minority enrollment goals by using a voluntary transfer magnet school scheme, but the result was an even greater increase in racial imbalance.[255] However, the subsequent Seattle Plan while it made "extensive use of busing and mandatory reassignments,"[256] apparently was effective in reducing the percentages of minority students in schools. In response to the Seattle Plan, a number of Seattle residents organized to propose Initiative 350 which was placed on the November 1978 general election ballot, was approved by the electorate and provided that, "no school board . . . shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . and which offers the course of study pursued by each student."[257] In addition, Initiative 350 specifically proscribed the use of seven

252. *Id.* at 226. The appeals court noted that "even if some method were devised to spread white students equally among all schools in the system, 74% of the students in each school would be black and hispanic."

253. The district had originally defined racial imbalance as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined average by 20 percentage points, provided that the single minority enrollment . . . of no school will exceed fifty percent of the student body." 473 F. Supp. 996, 1006 (W.D. Wash. 1979).

254. 102 S. Ct. 3187 (1982).

255. *Id.* at 3190.

256. *Id.* at 3191.

257. The Initiative was codified as WASH. REV. CODE ANN. § 28A.26.010-28A.26.900 (1981). The Initiative did have a number of broad exceptions: a student could be assigned beyond his neighborhood school if he "requires special education, care or guidance" or if "there are health or safety hazards, either natural or manmade, or physical barriers or obstacles . . . between the student's place of residence or next nearest school," or if "the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities."

enumberated methods of indirect student assignment—among them the redefinition of attendance zones, the pairing of schools, and the use of feeder schools—all of which were part of the Seattle Plan. The Initiative envisioned busing for racial purposes in only one circumstance: it did not purport "to prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools."[258] After electorate approval of Initiative 350, Seattle and the only other school district in the state with a comprehensive integration program filed suit against the State of Washington challenging the constitutionality of Initiative 350. As one of its reasons for finding the Initiative unconstitutional the federal district court held that "it permits busing for nonracial reasons but forbids it for racial reasons."[259] The federal court of appeals affirmed the district court decision because the Initiative "removes from local boards their existing authority, and in large part their capability, to enact programs designed to desegregate schools."[260]

In a 5-4 decision the United States Supreme Court affirmed the decisions of both lower courts.[261] The Supreme Court majority was not persuaded by the arguments of the United States (which had intervened on the side of the State of Washington) that busing for integration was not a "peculiarly racial issue at all" and that proponents as well as opponents of mandatory integration include blacks and whites.[262] The Supreme Court stated its rationale for striking down Initiative 350 as follows.

> [W]e have little difficulty concluding that Initiative 350 worked a major reordering of the State's educational decision-making process. Before adoption of the initiative, the power to determine what programs would not appropriately fill a school district's educational needs—including programs involving student assignment and desegregation—was firmly committed to the local board's discretion. After passage of Initiative 350, authority over all but one of those areas remained in the hands of the local board. By placing power over desegregative busing at the state level, then, Initiative 350 plainly differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area.[263]

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258. *Id.* at § 28A.26.060.

259. 473 F. Supp. 996, 1012 (W.D. Wash. 1979). The other two reasons for declaring the Initiative unconstitutional were that the Initiative established an impermissible racial classification and that "a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the Initiative." *Id.* at 1012, 1013.

260. 633 F.2d 1338, 1344 (3d Cir. 1980).

261. Dissenting were Justice Powell, Chief Justice Burger, Justice Rehnquist and Justice O'Connor.

262. *See supra* note 254 at 3196.

263. *Id.* at 3200.

**Pupil Transportation**

A quite different result was reached in a recent United States Supreme Court decision involving the Los Angeles Unified School District in the State of California.[264] In 1976 the California Supreme Court heard an appeal of a desegregation plan for Los Angeles, and the court determined that under its state equal protection clause "state school boards ... bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether the segregation be de facto or de jure in origin."[265] Under the court-ordered plan approximately 40,000 students in fourth through eighth grades were being bused, some for as long as two to four hours on round-trip bus rides.[266] In response to their California Supreme Court decision, the California electorate adopted an amendment to the due process and equal protection clauses of the state constitution, providing in part:

> No court of this state may impose upon the State of California or any public, board or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause.[267]

After approval of the amendment the Los Angeles school district petitioned to halt all mandatory reassignment and busing of pupils, but the state trial court denied the petition, ruling that the original 1970 court order had involved de jure segregation.[268] The California Court of Appeals reversed on the ground that the trial court's 1970 finding of facts did not support a finding of intentional discrimination.[269] The California Supreme Court denied hearing and the United States Supreme Court granted certiorari.[270]

The United States Supreme Court began its opinion by noting that "we agree with the California Court of Appeal in rejecting the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede."[271] In upholding the amendment

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264. Crawford v. Board of Educ. of City of Los Angeles, 102 S. Ct. 3211 (1982).
265. Crawford v. Board of Education, 532 P.2d 28, 34 (Cal. 1976).
266. *See supra* note 264 at 3214 n.4.
267. CAL. CONST. art. 1 § 7(a).
268. *See supra* note 264 at 3216.
269. 113 Cal. Rptr. 495 (Cal. App. Ct. 1980).
270. 454 U.S. 892 (1981).
271. *See supra* note 264 at 3216.

the Supreme Court observed that "the benefit it seeks to confer —neighborhood schooling—is made available regardless of race in the discretion of school boards."[272] In sustaining the amendment the court also declared that to prohibit states from repealing race related legislation would commit states "irrrevocably to legislation, that has proven unsuccessful or even harmful in practice."[273] It is important to note that the California Supreme Court in interpreting the same amendment later had occasion to declare the remedies which the state can still use, "for example, school closure, school site selection, creation of special 'magnet schools,' curriculum changes, or other steps to overcome the adverse effects of school segregation."[274]

272. *Id.* at 3218. *See also* Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971) where a neighborhood school policy does not in itself violate the 14th amendment.

273. *See supra* note 264 at 3219.

274. McKinney v. Oxnard Union High School Bd. of Trustees, 642 P.2d 460 (Cal. 1982); *see also* Tinsley v. Superior Court of San Mateo, 197 Cal. Rptr. 643 (Cal. App. Ct. 1983).

# III.

# Conclusion

Transportation decisions present a matrix of interacting problems for schools and school districts. At one dimension there is the tension between state agencies and local school districts regarding the funding and operation of transportation systems. In yet another dimension there is the tension between legislative statutory intent and judicial interpretation of the reasonableness or constitutionality of those statutes. In a third dimension there is the matter of duty of care owed to users of transportation services by those providing those services.

In analyzing the interactions within the transportation matrix and in attempting to predict the outcome of transportation decisions by the various schools or school districts it is helpful to consider several important parameters.

1. State legislatures approach transportation matters with varying degrees of specificity. While this advice may appear to be self-evident, it is critical that schools and school districts follow the prescribed standards and procedures established in legislative enactments, as well as additional regulations added by administrative agencies. Failure to follow standards or procedures could result in failure to receive state reimbursement or liability for an improper decision.

2. Schools and school districts must have coherent, consistent and comprehensive policies regarding the type of vehicles to be used for school functions. If school buses are not to be used then the school may want to consider leasing or renting vehicles in its own name. Where faculty or staff might incur personal liability through rental or operation of a vehicle used for school purposes, it would seem that the school should at least advise the renter and/or driver of potential liability. As a precaution, school districts should want to investigate the breadth of its liability coverage to include non-school owned transportation. Where schools and school districts have an apparent policy of expecting faculty to use alternate means of transportation, teacher unions may want to consider making the purchase of adequate liability coverage a subject of collective bargaining.

3. The care owed to students will always be a subject of litigation. Although not all accidents can be prevented, there are certain key

problem areas that are well within the control of schools. Clearly, regular maintenance is the responsibility of schools which own their own buses. Where bus service is contracted out, those schools or school districts which lease the buses have a responsibility to report defects and demand repairs. Schools which employ their own drivers will be expected to supervise their compliance with state requirements. Even where drivers are employed by a bus company-lessor and not the school, there is probably still a duty to report driver violations of state standards to the lessor as well as the appropriate state agency. It is critical that drivers, regardless by whom employed, follow precisely the school districts' procedures for picking up and discharging children. Because schools control the means of transportation and because the clientele (students) are of varying levels of immaturity, it can reasonably be expected that courts will scrutinize closely the policies and procedures of school districts.